Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-10/03 OF 2014 (W) AND 01(f)-09/03 OF 2014(W)
RAUS SHARIF PCA, SURIYADI, AHMAD MAAROP, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ
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Constitutional Law — Administration of Islamic law — Admission of syarie lawyers — Right of non-Muslim lawyer to be admitted as syarie lawyer in Wilayah Persekutuan — Whether Majlis empowered under s 59(2) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') to make the Peguam Syarie Rules 1993 ('Rules') relating to qualifications of admission of persons as syarie lawyer — Whether Majlis could prescribe faith of person to be a syarie lawyer — Whether r 10 of the Rules that imposed condition that syarie lawyer applicant must be a Muslim ultra vires the Act — Legislation — Delegated legislation — Whether delegated legislation could impose rules which were not authorised by parent statute — Whether s 59(2) of the Act merely enabling provision for Majlis to make Rules to regulate procedure and qualifications for admission as syarie lawyer — Whether that part of r 10 of the Rules mandating that only Muslims could be admitted as syarie lawyer ultra vires s 59(1) of the Act — Federal Constitution — Whether Majlis' power to make rules pursuant to s 59(2) was invalidated on ground of unconstitutionality — Whether r 10 discriminated on adequate grounds and was based on reasonable or permissible classification — Whether provision restricting admission as peguam syarie to Muslims within constitutional exception in art 8 cl (5)(b) of the Federal Constitution — Whether that part of r 10 of the Rules mandating that only Muslims could be admitted as peguam syarie in contravention of arts 5, 8(1), or 10(1)(c) of the Constitution

Statutory Interpretation — Construction of statutes — Literal approach — Whether s 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') had to be read subject to s 59(2) — Whether words 'subject to' should considered in interpreting any section in a statute — Whether s 59(2)(a) of the Act clothes Majlis with power to make rules pertaining to 'qualifications' for the admission of peguam syarie

Victoria Jayaseele Martin ('the respondent') was an advocate and solicitor of the High Court of Malaya and a holder of a Diploma in Syariah Law and Practice ('DSLP') conferred by the International Islamic University Malaysia. The appellant, the Majlis Agama Islam Wilayah Persekutuan ('the Majlis'), which was at all material times a body incorporated under the Administration of

Islamic Law (Federal Territories) Act 1993 ('the Act'), was charged under s 59 of the Act with the power to admit syarie lawyers to represent parties in any proceedings before the Syariah Courts, in the Federal Territories ('Wilayah Persekutuan'). The respondent, who was of the Christian faith, applied to the Majlis for admission as a syarie lawyer in Wilayah Persekutuan. The respondent was informed that her application was incapable of being processed on the ground that she was not a Muslim. According to the Majlis under r 10 of the Peguam Syarie Rules 1993 ('the Rules') it was a requirement for an applicant applying for admission as a syarie lawyer to be a Muslim. The respondent applied to the High Court for a judicial review and sought a few orders, namely a declaratory order, an order of certiorari and an order of mandamus. By way of her application the respondent sought, inter alia, a declaration that r 10 of the Rules was ultra vires the Act, and was also in contravention of arts 8(1), 8(2), 5 and 10(1)(c) of the Federal Constitution ('the Constitution'), and as a consequence void. The Majlis in turn applied to strike out the respondent's application for judicial review for want of jurisdiction since it involved matters within the jurisdiction of the Syariah Court. The respondent's application for judicial review and the Majlis' striking out application were heard together by the High Court. The High Court judge dismissed the striking out application on jurisdictional grounds. The High Court also dismissed the respondent's application for judicial review, on the grounds that the Majlis was empowered under s 59(2) of the Act to make the Rules relating to the qualifications of admission of persons as syarie lawyer, including the power to impose the condition that a syarie lawyer applicant must be a Muslim. Aggrieved by the High Court decision, the respondent appealed to the Court of Appeal, which allowed the respondent's appeal and declared that r 10 of the Rules was ultra vires the Act. The Majlis then applied for and obtained the leave of this court to proceed with the present appeal that raised two questions of law, namely whether r 10 of the Rules was ultra vires the Act and whether r 10 of the Rules was in contravention of arts 8(1), 8(2), 5 and 10(1)(c) of the Constitution, and thus void. The Majlis submitted that due to the clear and plain language of s 59(1) of the Act, it had to be read subject to s 59(2) of the Act and that in short, the discretion of the Majlis to admit any person with sufficient knowledge of Islamic Law to be a syarie lawyer was subject to sub-s (2). The appellant further contended that its power to legislate on the qualification of a syarie lawyer was based on Islamic Jurisprudence and that art 8(5) of the Constitution provided lawful discrimination based on classification. The respondent argued that s 59(1) of the Act imposed only one condition to become a syarie lawyer, that is a person should have 'sufficient knowledge of Islamic law'. According to the respondent, s 59(2) of the Act was merely an enabling provision for the appellant to make rules to regulate the procedure and qualifications for admission as a syarie lawyer. Being a delegated legislation, the Rules had to fall within the scope of the power granted to it by the Act. In other words, delegated legislation could not impose rules which were not authorised by the parent statute. Consequently, that part of r 10 which alluded to faith was ultra

vires the Act and therefore liable to be declared void, as it had exceeded the limits prescribed by the parent law by creating an inconsistency with it. On the constitutional aspect, the respondent began by alluding to art 8(1), which provided that all persons were equal before the law, and entitled to the equal protection of the law. The respondent thus submitted that as a citizen she was entitled to plead art 8(2), as she was discriminated against on the ground of religion, in pursuance of her profession as a syarie lawyer.

Held, allowing the appeals with no order as to costs:

(1) **(per Raus Sharif PCA, majority)** There was a sharp differing view between the parties as to the interpretation of the words 'subject to sub-s (2)' in s 59(1) of the Act. The words 'subject to' mean conditional or dependent upon something, which implied that the application of s 59(1) of the Act was conditional and dependent upon the provision in s 59(2). In other words, the words 'subject to' should be a factor to be considered in interpreting any section in a statute and in the present case, the term 'subject to' in the beginning of s 59(1) of the Act was not merely an enabler, but an important part of the provision which may determine the manner in which the provision was to be read and construed. Thus, the term 'any person having sufficient knowledge of Islamic law' as found in s 59(1) was meant to be read subject to the powers of the Majlis pursuant to s 59(2) to make rules to provide for the procedures, qualifications and fees for the admission of *peguam syarie* in Wilayah Persekutuan. Thus, s 59(1) of the Act should be read harmoniously with s 59(2)(a) of the Act (see paras 23–27).

(2) **(per Raus Sharif PCA, majority)** Clearly, s 59(2)(a) of the Act clothes the Majlis with the power to make rules pertaining to 'qualifications' for the admission of a *peguam syarie*. The word 'qualification' was not defined in the Act, nor the Interpretation Act 1948 and 1967. Therefore, it should be given its ordinary and plain meaning as prescribed in the English language. The approach taken by the High Court judge that the word 'qualifications' used in s 59(2) was wide enough to enable the Majlis to impose the conditions appearing in r 10 of the Rules, was correct. The fallacy of the respondent's argument was in placing undue emphasis on the word 'any person having sufficient knowledge of Islamic law' and giving scant regard to the opening words of s 59(1) of the Act where the rest of the provisions came into play through the usage of the word 'subject to'. In effect the additional qualifications required by the Majlis under r 10, read together with the qualification of 'any person with sufficient knowledge of Islamic law' appearing in s 59(1) of the Act, would complete the definition as to who may be appointed as a *peguam syarie* for the purposes of the Act. By saying that the Majlis could not prescribe the faith of a person to be a Muslim to be a *peguam syarie*, the respondent was saying that the Majlis also could not prescribe other

conditions which appeared in r 10 of the Rules. However, to interpret 'any person having sufficient knowledge of Islamic law' in s 59(1) of the Act, as the only requirement to be admitted as *peguam syarie* would be repugnant to the intention of the Act and lead to some manifest absurdity. In the circumstances, the respondent's contention was untenable and that part of r 10 of the Rules mandating that only Muslims could be admitted as *peguam syarie* was not ultra vires s 59(1) of the Act (see paras 28–35).

(3) **(per Raus Sharif PCA, majority)** The law on art 8 of the Constitution was settled in that, a law that discriminated was good law if it was based on reasonable or permissible classification. However, the classification should have rational relation to the object sought to be achieved by the law in question for it to become a valid law. The issue as to whether a particular classification was rational or not was to be determined by looking at the object and intent of such laws and the Rules drafted thereunder. In the context of the present case, in order to appreciate the real intent and object of the law, it was crucial to look at the whole scheme of the Act. It was clear that the object of the Act was to enforce and administer Islamic law as well as to provide for the constitution and organisation of the Syariah Court. It was common ground that the Syariah Court had jurisdiction only over persons professing the religion of Islam. Hence, the persons appearing before the Syariah Court should also be subjected to its jurisdiction. The Syariah Court ought to be able to enforce its laws and rules on a *peguam syarie*, as for instance, when contempt or any breach of the rules was committed by any party. Surely, the Syariah Court would not be able to enforce its laws and rules against the respondent, as she was a non-Muslim. The Syariah Court had no jurisdiction against her. The Majlis in exercising its delegated power made rules, inter alia, that only a Muslim may be admitted as *peguam syarie*. Thus, if the Legislature deemed it necessary that for the purpose of achieving the object of Act, it required a rule that only a Muslim may be admitted as *peguam syarie* and that rule was made directed to the problem, and it discriminated on adequate grounds, then the law did not violate art 8 of the Constitution and was therefore a good law (see paras 45–50).

(4) **(per Raus Sharif PCA, majority)** Further, having a *peguam syarie* who professed the religion of Islam was important to achieve the object of the Act. Faith here being the cornerstone was necessary to achieve the object of the Act. One of the most important criteria which made an upright and virtuous *peguam syarie* was for the lawyer to have 'Aqidah' which means belief with certainty and conviction in one's heart and soul in Allah and His divine Law. Thus, from the perspective of Syariah, it was fundamentally crucial for *peguam syarie* to be selected among the Muslims and only those who have faith in the religion of Islam and who

A are able to perform their duties with full conviction of that belief (see para 51).

(5) **(per Raus Sharif PCA, majority)** The issue on the deprivation of the respondent's livelihood was misplaced as based on the facts of this case as the respondent was not deprived of her law practice in the civil court. The respondent's reliance on art 10(1)(c) of the Constitution was also without any merit. It was clear that art 10(1)(c) referred specifically to the 'right to form associations', and not to the right to be a member of any profession or association. In the circumstances, that part of r 10 of the Rules mandating that only Muslims can be admitted as *peguam syarie*, was not in contravention of arts 5, 8(1), or 10(1)(c) of the Constitution (see paras 52–58).

(6) (**per Suriyadi FCJ, dissenting**) Shorn of all the frills, with the introduction of r 10 in the current format, the Majlis had now rewritten s 59(1) by effectively making it read, 'any Muslim with sufficient knowledge of Islamic law' may become a *peguam syarie*. This was clearly a case of a subsidiary legislation subjugating a parent legislation. Now, a non-Muslim, in this case a Christian, however academically endowed, was effectively barred from applying to be a *peguam syarie*. With the *Hansard* report clearly evincing that it was never the intention of Parliament to shut the doors to academically endowed non-Muslims having sufficient knowledge of Islamic law to appear in any Syariah Court, and s 59(1) in its ordinary and natural sense easily understood, it was thus the primary duty of the court to give effect to the intention of Parliament. Had it been the intention of Parliament to merely allow Muslims to be *peguam syarie*, that religious requirement could have been inserted in s 59(1) without much hassle. A perusal of the impugned part of r 10 showed that it was not in sync with the object of the Act, as the importation of a religious requirement in this subsidiary piece of legislation without more, had disqualified an otherwise eligible candidate here (see paras 108–109, 112 & 116–117).

(7) (**per Suriyadi FCJ, dissenting**) In the current appeal r 10 was clearly ultra vires its parent law, as it has gone past the limit prescribed by the Act. Admitting only Muslims as *peguam syarie* had no nexus to the object of the Act. This additional requirement which militated against the very intention of Parliament was contextually unsustainable, and had imposed a restrictive and draconian qualification that was not subscribed in the Act. The Majlis could not by way of a subsidiary legislation, make r 10 that was inconsistent with s 59(1) of the Act. Rule 10 of the Rules was thus ultra vires the parent Act (see paras 125 & 152).

(8) (**per Suriyadi FCJ, dissenting**) In the present case, when the respondent sought to be admitted as a *peguam syarie* she was seeking to be admitted to an 'office' that would enable her to then accept 'employment' by clients

to represent them in the Syariah Court and carry on her profession in the Syariah Courts. Given the jurisdiction of the Syariah Courts, that office and that employment were certainly connected to the affairs of the religion of Islam. Consequently, a provision restricting admission as *peguam syarie* to Muslims was within the constitutional exception in art 8 cl (5)(b) of the Constitution. In the light of the clear purpose of art 10(1)(c), which had nothing to do with admission as a *peguam syarie*, the respondent's argument premised on this article should fail (see para 139).

[Bahasa Malaysia summary

Victoria Jayaseele Martin ('responden') ialah seorang peguambela dan peguamcara Mahkamah Tinggi Malaya dan memegang Diploma Amalan dan Undang-Undang Syariah ('DAUS') yang diberikan oleh Universiti Islam Antarabangsa Malaysia. Perayu, Majlis Agama Islam Wilayah Persekutuan ('Majlis tersebut'), yang mana pada setiap masa matan sebuah badan yang ditubuhkan di bawah Akta Undang-Undang Pentadbiran Islam (Wilayah-Wilayah Persekutuan) 1993 ('Akta tersebut') telah dituduh di bawah s 59 Akta tersebut yang mempunyai kuasa untuk menerima peguam-peguam syarie bagi mewakili pihak-pihak dalam apa-apa prosiding di hadapan Mahkamah Syariah, di Wilayah Persekutuan. Responden, seorang beragama Kristian, telah memohon kepada Majlis tersebut untuk diterima sebagai peguam syarie di Wilayah Persekutuan. Responden telah diberitahu bahawa permohonannya tidak dapat diproses atas alasan dia bukan seorang Muslim. Menurut Majlis tersebut di bawah k 10 Kaedah-Kaedah Peguam Syarie 1993 ('Kaedah tersebut'), ia adalah keperluan untuk pemohon yang memohon untuk diterima sebagai peguam syarie ialah seorang Muslim. Responden memohon kepada Mahkamah Tinggi untuk semakan kehakiman dan memohon beberapa perintah, iaitu perintah deklarasi, perintah certiorari dan perintah mandamus. Melalui permohonannya responden memohon, antara lain, deklarasi bahawa k 10 Kaedah adalah ultra vires Akta , dan juga bertentangan dengan perkara 8(1), perkara 8(2), perkara 5 dan perkara 10(1)(c) Perlembagaan Persekutuan ('Perlembagaan'), dan oleh itu tidak sah. Majlis tersebut sebaliknya telah memohon untuk membatalkan permohonan semakan kehakiman responden kerana tiada bidang kuasa yang melibatkan perkara dalam bidang kuasa Mahkamah Syariah. Permohonan responden untuk semakan kehakiman dan permohonan pembatalan Majlis tersebut telah didengar bersama oleh Mahkamah Tinggi. Hakim Mahkamah Tinggi telah menolak permohonan pembatalan itu atas alasan berkenaan bidang kuasa. Mahkamah Tinggi juga telah menolak permohonan semakan kehakiman responden, atas alasan Majlis tersebut telah diberikan kuasa di bawah s 59(2) Akta untuk membuat kaedah berhubung dengan kelayakan penerimaan seseorang sebagai peguam syarie, termasuk kuasa untuk mengenakan syarat bahawa pemohon peguam syarie mestilah seorang Muslim. Terkilan dengan keputusan Mahkamah Tinggi, responden telah merayu kepada Mahkamah Rayuan, yang membenanrkan rayuan responden dan mengisytiharkan bahawa

k 10 Kaedah adalah ultra vires Akta. Majlis tersebut kemudian telah memohon untuk dan memperoleh kebenaran mahkamah ini bagi meneruskan rayuan ini yang menimbulkan dua persoalan undang-undang, iaitu sama ada k 10 Kaedah ultra vires Akta dan sama ada k 10 Kaedah bertentangan dengan perkara 8(1), perkara 8(2), perkara 5 dan perkara 10(1)(c) Perlembagaan, dan oleh itu tidak sah. Majlis tersebut berhujah bahawa kerana bahawa s 59(1) Akta adalah jelas dan biasa, ia perlu dibaca tertakluk kepada s 59(2) Akta dan pendek kata, budi bicara Majlis tersebut untuk menerima mana-mana orang yang mempunyai pengetahuan yang mencukupi tentang Undang-Undang Islam untuk menjadi peguam syarie adalah tertakluk kepada sub-s (2). Perayu selanjutnya berhujah bahawa kuasanya untuk menggubal tentang kelayakan peguam syarie adalah berdasarkan jurisprudens Islam dan bahawa perkara 8(5) Perlembagaan memperuntukkan diskriminasi yang sah berdasarkan klasifikasi. Responden berhujah bahawa s 59(1) Akta mengenakan hanya satu syarat untuk menjadi peguam syarie, iaitu seseorang itu hendaklah mempunyai 'sufficient knowledge of Islamic law'. Menurut responden, s 59(2) Akta hanya peruntukan sedia ada untuk perayu membuat kaedah bagi mengawal prosedur dan kelayakan untuk diterima sebagai peguam syarie. Sebagai perundangan perwakilan, Kaedah perlu terangkum dalam skop kuasa yang diberikan kepadanya oleh Akta. Dalam erti kata lain, perundangan perwakilan tidak boleh mengenakan kaedah yang tidak diberi kuasa oleh undang-undang induk. Akibatnya, bahagian k 10 yang merujuk kepada kepercayaan adalah ultra vires Akta dan oleh itu boleh diisytiharkan tidak sah, kerana ia melebihi had yang ditetapkan oleh undang-undang induk sehingga mewujudkan ketidakselarasan. Pada aspek perlembagaan, responden bermula dengan merujuk kepada perkara 8(1), yang memperuntukkan bahawa semua orang adalah sama di sisi undang-undang, dan berhak mendapat perlindungan sama di sisi undang-undang. Responden oleh itu berhujah bahawa sebagai warganegara dia berhak mempli perkara 8(2), kerana dia didiskriminasikan atas alasan agama, dalam memperoleh profesion sebagai peguam syarie.

Diputuskan, membenarkan rayuan-rayuan tanpa perintah untuk kos:

(1) **(oleh Raus Sharif PCA, majoriti)** Terdapat pendapat yang berbeza antara pihak-pihak berhubung tafsiran perkataan-perkataan 'subject to sub-s (2)' dalam s 59(1) Akta. Perkataan-perkataan 'subject to' bermaksud bersyarat atau bergantung kepada sesuatu, yang tersirat bahawa permohonan s 59(1) Akta adalah bersyarat dan bergantung kepada peruntukan dalam s 59(2). Dalam erti kata lain, perkataan-perkataan 'subject to' hendaklah merupakan faktor yang perlu dipertimbangkan dalam mentafsir mana-mana seksyen dalam statut dan dalam kes ini, istilah 'subject to' di permulaan s 59(1) Akta bukan hanya membolehkan, tetapi bahagian penting peruntukan itu yang boleh menentukan cara di mana peruntukan itu dibaca dan ditafsirkan. Oleh itu, istilah 'any person having sufficient knowledge of Islamic law'

sepertimana didapati dalam s 59(1) bermaksud untuk dibaca tertakluk kepada kuasa-kuasa Majlis tersebut menurut s 59(2) bagi membuat kaedah-kaedah agar memperuntukkan prosedur, kelayakan dan fi untuk kemasukan sebagai peguam syarie di Wilayah Persekutuan. Oleh itu, s 59(1) Akta hendaklah dibaca secara harmoni dengan s 59(2)(a) Akta (lihat perenggan 23–27).

(2) **(oleh Raus Sharif PCA, majoriti)** Adalah jelas s 59(2)(a) Akta memberikan Majlis tersebut kuasa untuk membuat kaedah-kaedah berkenaan 'qualifications' untuk penerimaan peguam syarie. Perkataan 'qualification' tidak ditafsirkan dalam Akta, ataupun Akta Tafsir 1948 dan 1967. Oleh itu, ia patut diberikan maksudnya yang biasa dan nyata sepertimana ditetapkan dalam bahasa Inggeris. Pendekatan diambil oleh hakim Mahkamah Tinggi bahawa perkataan 'qualifications' digunakan dalam s 59(2) adalah cukup luas untuk membolehkan Majlis tersebut mengenakan syarat-syarat dalam k 10 Kaedah, adalah betul. Kelemahan hujah responden adalah meletakkan penekanan yang tidak perlu ke atas perkataan 'any person having sufficient knowledge of Islamic law' dan kurang menghiraukan perkataan-perkataan pembukaan s 59(1) Akta di mana peruntukan lain berfungsi melalui penggunaan perkataan 'subject to'. Sebagai kesan kelayakan tambahan yang dikehendaki oleh Majlis tersebut di bawah k 10, dibaca bersama kelayakan 'any person with sufficient knowledge of Islamic law' yang terdapat dalam s 59(1) Akta, akan melengkapkan definisi berhubung siapa yang boleh dilantik sebagai peguam syarie bagi matlamat Akta. Dengan mengatakan bahawa Majlis tersebut tidak boleh menetapkan agama seseorang itu adalah Islam untuk menjadi peguam syarie, responden mengatakan bahawa Majlis tersbeut juga tidak boleh menetapkan syarat lain yang terdapat dalam k 10 Kaedah. Walau bagaimanapun, untuk mentafsir 'any person with sufficient knowledge of Islamic law' dalam s 59(1) Akta, sebagai satu-satunya keperluan untuk diterima sebagai peguam syarie adalah bertentangan dengan niat Akta dan membawa kepada suatu yang tidak munasabah langsung. Dalam keadaan itu, hujah responden tidak boleh dikekalkan dan bahagian k 10 Kaedah yang memberi mandate bahawa hanya orang Muslim boleh diterima sebagai peguam syarie tidak ultra vires s 59(1) Akta (lihat perenggan 28–35).

(3) **(oleh Raus Sharif PCA, majoriti)** Undang-undang berhubung perkara 8 Perlembagaan adalah tetap di mana, undang-undang yang mendiskriminasikan adalah undang-undang baik jika ia berdasarkan klasifikasi yang munasabah atau dibenarkan. Walau bagaimanapun, klasifikasi itu hendaklah mempunyai kaitan rasional dengan matlamat yang ingin dicapai dari segi undang-undang yang dipersoalkan agar ia menjadi undang-undang sah. Isu sama ada klasifikasi tertentu adalah rasional atau tidak ditentukan dengan melihat kepada matlamat dan niat undang-undang sebegini dan Keadah telah digubal sedemikian. Dalam

konteks kes ini, bagi matlamat memahami niat dan matlamat sebenar undang-undang, ia adalah penting untuk melihat keseluruhan skima Akta. Adalah jelas bahawa matlamat Akta adalah untuk menguatkuasa dan mentadbir undang-undang Islam dan juga memperuntukkan perlembagaan dan penubuhan Mahkamah Syariah. Adalah alasan biasa bahawa Mahkamah Syariah mempunyai bidang kuasa hanya ke atas orang yang beragama Islam. Justeru, orang yang hadir di hadapan Mahkamah Syariah juga hendaklah tertakluk kepada bidang kuasanya. Mahkamah Syariah patut boleh menguatkuasakan undang-undang dan kaedahnya berhubung peguam syarie, sebagai contoh, apabila penghinaan atau apa-apa pelanggaran kaedah tersebut dilakukan oleh mana-mana pihak. Pasti Mahkamah Syariah tidak dapat menguatkuasakan undang-undang dan kaedahnya terhadap responden, kerana dia bukan seorang Muslim. Mahkamah Syariah tiada bidang kuasa terhadapnya. Majlis tersebut dalam melaksanakan kuasa perwakilan yang membuat kaedah, antara lain, bahawa hanya seorang Muslim boleh diterima sebagai peguam syarie. Oleh itu, jika badan perundangan menganggap ia perlu bagi matlamat mencapai objektif Akta, ia memerlukan satu kaedah bahawa hanya seorang Muslim boleh diterima sebagai peguam syarie dan bahawa kaedah tersebut dibuat untuk menangani masalah itu, dan ia mendiskriminasikan atas alasan mencukupi maka undang-undang itu tidak melanggar perkara 8 Perlembagaan dan oleh itu adalah undang-undang baik (lihat perenggan 45–50).

(4) **(oleh Raus Sharif PCA, majoriti)** Selanjutnya, mempunyai peguam syarie yang beragama Islam adalah penting untuk mencapai matlamat Akta. Kepercayaan di sini sebagai asas adalah perlu untuk mencapai matlamat Akta. Salah satu kriteria paling penting yang menjadikan peguam syarie yang jujur dan berakhlak mulia adalah untuk peguam itu mempunyai 'Aqidah' yang bermaksud kepercayaan yang pasti dan menyerahkan kepada Allah dan pengadilanNya. Oleh itu, dari perspektif hukum Syariah, ia adalah penting bagi peguam syarie dipilih di kalangan orang Muslim dan hanya mereka yang mempunyai kepercayaan dalam agama Islam dan mereka yang boleh melaksanakan kewajipan mereka dengan sepenuh hati terhadap kepercayaan itu (lihat perenggan 51).

(5) **(oleh Raus Sharif PCA, majoriti)** Isu berhubung kilanan kehidupan responden tidak berasas kerana berdasarkan fakta kes ini responden tidak terkilan dalam amalan undang-undangnya di mahkamah sivil. Kebergantungan responden kepada perkara 10(1)(c) Perlembagaan juga adalah tanpa merit. Adalah jelas bahawa perkara 10(1)(c) merujuk secara khusus kepada 'right to form associations', dan bukan hak menjadi ahli mana-mana profesion atau persatuan. Dalam keadaan berikut, bahagian k 10 Kaedah yang memberi mandat bahawa hanya orang Muslim boleh diterima sebagai peguam syarie, tidak bertentangan perkara 5, 8(1), atau

10(1)(c) Perlembagaan (lihat perenggan 52–58).

(6) (**oleh Suriyadi HMP, menentang**) Pengenalan k 10 dalam format terkini, Majlis tersebut kini meminda s 59(1) yang memberi kesan apabila dibaca, 'any Muslim with sufficient knowledge of Islamic law' boleh menjadi peguam syarie. Ini jelas kes perundangan kecil mengetepikan perundangan induk. Sekarang, seorang bukan Muslim, dalam kes seorang beragama Kristian, walaupun mempunyai akademik yang tinggi, secara efektif dihalang daripada memohon untuk menjadi peguam syarie. Laporan *Hansard* jelas mengatakan bahawa ia bukan niat Parlimen untuk menutup pintu kepada orang bukan Muslim yang mempunyai akademik tinggi dan pengetahuan mencukupi tentang undang-undang Islam untuk hadir di mana-mana Mahkamah Syariah, dan s 59(1) dalam sifat semulajadi dan biasanya mudah difahami, ia dengan itu adalah kewajipan utama mahkamah untuk memberi kesan kepada niat Parlimen. Jika ia niat Parlimen untuk hanya membenarkan orang Muslim menjadi peguam syarie, keperluan agama itu mungkin boleh dimasukkan dalam s 59(1) tanpa kekecohan. Penelitian bahagian k 10 yang dipersoalkan menunjukkan bahawa ia tidak selaras dengan matlamat Akta kerana dengan memasukkan keperluan agama dalam perundangan kecil dengan itu sebaliknya tidak melayakkan calon berkelayakan di sini (lihat perenggan 108–109, 112 & 116–117).

(7) (**oleh Suriyadi HMR, menentang**) Dalam rayuan ini k 10 jelas ultra vires undang-undang induknya, kerana ia telah melebihi had yang ditetapkan oleh Akta. Dengan menerima hanya orang Muslim sebagai peguam syarie tiada kaitan dengan matlamat Akta. Keperluan tambahan ini yang menghalang niat Parlimen tidak boleh dikekalkan mengikut konteks, dan telah mengenakan kelayakan yang terbatas dan *draconian* yang tidak dinyatakan dalam Akta. Majlis tersebut tidak boleh melalui perundangan kecil, menjadikan k 10 yang tidak konsisten dengan s 59(1) Akta. Kaedah 10 Kaedah oleh itu adalah ultra vires Akta ibu (lihat perenggan 125 & 152).

(8) (**oleh Suriyadi HMP, menentang**) Dalam kes ini, apabila responden memohon untuk diterima sebagai peguam syarie dia memohon untuk diterima ke dalam 'office' yang membolehkannya kemudian menerima 'employment' oleh anak guam bagi mewakili mereka dalam Mahkamah Syariah dan menjalankan profesionnya di Mahkamah Syariah. Berdasarkan bidang kuasa Mahkamah Syariah, pejabat dan pekerjaan tersebut sudah tentu dikaitkan dengan urusan agama Islam. Berikutan itu, satu peruntukan menghalang kemasukan sebagai peguam syarie kepada orang Muslim adalah pengecualian perlembagaan dalam perkara 8 fasal (5)(b) Perlembagaan. Berdasarkan tujuan jelas perkara 10(1)(c), yang tiada kaitan dengan kemasukan sebagai peguam syarie, hujah

responden yang berasaskan perkara ini patut gagal (lihat perenggan 139).]

Notes

For cases on literal approach, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 1921–1953.

Cases referred to

Abdul Ghani bin Ali Ahmad & Ors v PP [2001] 3 MLJ 561; [2001] 3 CLJ 769, FC (refd)

Aminah v Superintendant of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92 (refd)

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, FC (refd)

Bharat Barrel & Drum Manufacturing Co Pte Ltd v Employees State Insurance Corporation AIR 1972 SC 1935, SC (refd)

Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69, FC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Interverner) [2004] 2 MLJ 257, FC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)

Dunkley v Sullivan, Re [1930] 1 Ch 84, Ch D (refd)

Government of Malaysia & Anor v Selangor Pilot Association [1977] 1 MLJ 133, PC (refd)

Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33, FC (folld)

Government of the Federation of Malaya v Surinder Singh Kanda [1961] 1 MLJ 121, CA (refd)

Ira & AC Berk Ltd v Commonwealth of Australia [1930] 30 SR (NSW) 119 (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)

Lembaga Minyak Sawit Malaysia v Arunamari Plantation Sdn Bhd & Ors and Another Appeal [2015] 4 MLJ 701; [2015] 5 MLRA 1, FC (refd)

Lo Pui Sang and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, Intervener) and Other Appeals [2008] 4 SLR 754, HC (refd)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, SC (refd)

Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356 (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)

PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)

Palmco Holdings Bhd v Commissioner of Labour & Anor [1986] 1 MLJ 492, SC (refd)
Pepper v Hart [1993] AC 593, HL (refd)
Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713; [2009] 4 MLRA 265, FC (folld)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)
Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors AIR 1958 SC 538, SC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
T Ramsay Ltd v Inland Revenue Commissioners [1982] AC 300, HL (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Taylor v Dental Board of South Australia [1940] SASR 306 (refd)
Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang – which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990) [2010] 2 MLJ 155, FC (refd)
V Sudeer v Bar Council of India AIR 1999 SC 1167, SC (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 ss 4(1), 10, 42, 59, 59(1), (2), (2)(a), (3)
Advocates Act 1961 [IND]
Dentists Act 1931 [AU]
Federal Constitution art 4(1), 5 , 5(1), 6, 7, 8, 8(1), (2), (5), (5)(a), (5)(b), 9, 10, 10(1)(c), 11, 12, 13, 150, Ninth Schedule, List II, Item (1)
Interpretation Act 1948 and 1967 ss 17A, 23, 23(1)
Legal Aid Act 1971 s 3
Peguam Syarie Rules 1993 rr 3 , 10 , 10(b), (c), (d), (e)
Rules of the High Court 1980 O 18 r 19
Constitution of the Republic of Singapore [SG] art 9(1)

Appeal from: Civil Appeal No W-01–242 of 2011

Sulaiman Abdullah (Haniff Khatri, Zulkifli bin Che Yong, Azmi bin Mohd Rai , Ilyani bt Noor Khuszairy and Abdul Rahim Sinwan with him) (Zulkifli Yong Azmi & Co) in Civil Appeal No 01(f)-10/3 of 2014(W) for the appellant.
Suzana bt Atan (Arik Sanusi bin Yeop Johari and Shamsul bin Bolhassan with her) (Attorney General's Chambers) in Civil Appeal No 01(f)-9/3 of 2014(W) for the appellant.

Cyrus Das (Benjamin Dawson, Ranjit Singh, Villie Nethi with him) (Ranjit Singh & Yeoh) in Civil Appeal Nos 01(f)-10/3 of 2014(W) and 01(f)-9/3 of 2014(W) for the respondant.
Eugene Roy Joseph (watching brief for Catholic Lawyers Society of Kuala Lumpur).

Raus Sharif PCA (delivering majority judgment of the court):

INTRODUCTION

[1] These two appeals raises the issue of whether a non-Muslim can be admitted as *peguam syarie* to represent parties in any proceedings before the Syariah Court in Wilayah Persekutuan, Kuala Lumpur. In Appeal No 01 (f)-10/03 of 2014(W), the appellant is the Majlis Agama Islam Wilayah Persekutuan ('the Majlis') while in Appeal No 01(f)-09/03 of 2014(W) the appellant is the Peguam Negara Malaysia.

[2] The respondent in both these appeals is Victoria Jayaseele Martin, an advocate and solicitor of the High Court of Malaya. She is also a Diploma holder in Syariah Law and Practice from the International Islamic University of Malaysia. She is of the Christian faith.

[3] For convenience, we will refer the appellant in Appeal No 01(f)-10/03 of 2014(W) as the Majlis, while the appellant in Appeal No 01(f)-09/03 of 2014 as the Attorney General.

BACKGROUND FACTS

[4] To state briefly, the respondent by a letter dated 24 August 2009 applied to the Peguam Syarie Committee established by the Majlis pursuant to r 3 of the Peguam Syarie Rules 1993 ('the Rules') for an admission as a *peguam syarie*.

[5] By a letter dated 9 September 2009 the Peguam Syarie Committee informed the respondent that her application was incapable of being processed as she is a non-Muslim and therefore had not met the requirement as set out in r 10 of the Rules in that the applicant must be a Muslim.

[6] Aggrieved with the decision of the Peguam Syarie Committee, the respondent applied for judicial review and sought the following reliefs:

(a) a declaration that, that part of r 10 of the Peguam Syarie Rules mandating that only Muslims can be admitted as *peguam syarie* is ultra vires the Administration of Islamic Law (Federal Territories) Act 1993;

(b) a declaration that, that part of r 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as *peguam syarie* is in

contravention of art 8(1) and/or art 8(2) and/or art 5 and/or art 10(1)(c) of the Federal Constitution and as a consequence is void;

(c) an order of certiorari to quash the decision of the Majlis in refusing to process the respondent's application to be admitted as a *peguam syarie*; and

(d) an order of mandamus to compel the Majlis to receive and process the respondent's application to be admitted as a *peguam syarie* without regard to the fact that the respondent is a non-Muslim.

[7] The Majlis then applied to strike out the respondent's application for judicial review for want of jurisdiction since it involved matters within the jurisdiction of the Shariah Court. The respondent's application for judicial review and the Majlis striking out application were heard together by the High Court.

AT THE HIGH COURT

[8] Before the High Court, learned counsel for the respondent contended that r 10 of the Rules is ultra vires s 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') as it was made outside the ambit and requirement of s 59(1), which stipulates that 'the Majlis may admit any person having sufficient knowledge of Islamic law to be *peguam syarie* to represent parties in any proceedings before the Syariah Court'. Learned counsel argued that based on s 59(1) of the Act a person need not be a Muslim to have sufficient knowledge of Islamic law. (The ultra vires question.)

[9] Learned counsel further argued that the enactment of r 10 of the Rules is against the liberty and equality clauses under arts 5, 8, 10 and 11 of the Federal Constitution. (The constitutional question.)

[10] In reply to the ultra vires question, learned counsel for the Majlis contended that the Majlis is empowered under s 59(2) of the Act to legislate on the qualifications of *peguam syarie* as s 59(2) of the Act gives the power to the Majlis to make rules 'to provide for the procedure, qualifications and fees for the admission of *peguam syarie*'.

[11] With regard to the constitutional question, learned counsel's stance was that the fundamental right under art 5(1) of the Federal Constitution is not absolute and this right can be taken away by law duly passed by the Parliament. As for infringement of art 8(1) of the Federal Constitution, learned counsel emphasised that art 8 does not preclude the making reasonable of classification of categories, so long as there is no discrimination among the members of that category.

[12] On 17 March 2011, the learned High Court judge dismissed the respondent's application for judicial review and also the Majlis striking out application. The learned High Court judge ruled that the Majlis is empowered under s 59(2) of the Act to make rules relating to qualifications for admission of persons as *peguam syarie*, including the power to impose a condition that the applicant must be a Muslim. Her Ladyship in addressing the ultra vires question and the constitutional question held that:

(a) since s 59(1) of the Act begins with the opening words 'subject to sub-s (2)', it must be read subject to sub-s (2). In plain language it means that the discretion of the Majlis to admit any person with sufficient knowledge of Islamic law to be *peguam syarie* is subject to sub-s (2), and that s 59(1) of the Act does not stand alone without any condition. Further, the words 'may admit' in s 59(1) of the Act denote that it is not mandatory for the Majlis to admit a person solely on the basis of having sufficient knowledge of Islamic law. It was the intent of the Legislature to delegate to the Majlis the power to determine the necessary qualifications at its discretion. Hence, Majlis was empowered to add, vary or to limit the said qualifications and was empowered by virtue of s 59(2) of the Act to regulate the qualifications of a *peguam syarie*;

(b) in the absence of the definition of 'qualification' in the Act or in the Interpretation Act, the plain and ordinary meaning of the word has to be adopted. In this regard, the plain and ordinary meaning of the word 'qualification' is wide enough to allow Majlis to impose the conditions appearing in r 10 of the Rules; and

(c) the impugned r 10 of the Rules did not contravene art 8 of the Federal Constitution and was not unconstitutional. The legislature deemed it necessary that for the purpose of achieving the object of the Act, it required a rule that only a Muslim may be admitted as a *peguam syarie* and as such that rule was made directed to the problem, manifest by experience. Since it discriminated on adequate grounds, then the law did not violate art 8 of the Federal Constitution. Further, having a Syarie lawyer who professes the religion of Islam will achieve the object of the Act with faith being a dimension necessary in its approach. In such a case there was nexus between the impugned rule and the object of the Act.

AT THE COURT OF APPEAL

[13] Aggrieved by the High Court decision, the respondent appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal. In setting aside the orders of the High Court, the Court of Appeal granted the respondent the orders of certiorari and mandamus and declared that r 10 of the Rules mandating that only Muslims may be admitted as *peguam syarie* was ultra vires s 59(1) of the Act. The Court of Appeal in doing so held that:

(a) r 10 of the Rules which provided that a person may be admitted as a *peguam syarie* if he or she is a Muslim is contrary to s 59(1) of the Act which expressly allowed the Majlis to admit 'any person having sufficient knowledge of Islamic law' to be admitted as *peguam syarie*. In the absence of any definition, the words 'any person' in s 59(1) of the Act in their natural meaning must mean any person regardless of his or her religion. There was nothing in the Act to restrict the meaning of the words 'any person' to mean 'any Muslim';

(b) the Rules made under s 59(2) of the Act were a form of subsidiary legislation and they did not stand on equal footing as the Act and could not override the Act. The powers of the Majlis to admit any person having sufficient knowledge of Islamic law as *peguam syarie* was conferred by the Act. The Majlis could not by way of subsidiary legislation, make rules inconsistent with or contrary to s 59(1) of the Act;

(c) the phrase 'subject to sub-s (2)' in s 59(1) of the Act did not make s 59(1) subservient to s 59(2) because s 59(2) itself did not take away or curtail the powers of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam syarie*. Section 59(2) was merely an enabling provision which the legislature had conferred on the Majlis to make rules regulating the procedure and qualifications for admission of *peguam syarie*;

(d) the amendment to s 59(1) of the Act did not alter the meaning of the words 'any person' in s 59(1) or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam syarie*. The amendment, in fact, widened the powers of the Majlis to admit a *peguam syarie*. The word 'persons' in the original s 59(1) had been amended to 'any person' in the amended s 59(1), whilst a new sub-s (3) widened the power of the Majlis by allowing it to exempt any member of the judicial and legal services or any person appointed under s 3 of the Legal Aid Act 1971 from the provisions of s 59 of the Act. Thus any such person could appear in the Shariah Court on behalf of any party upon being granted the exemption by the Majlis;

(e) the words 'any person' in s 59(1) of the Act included any person regardless of his religion. The Act did not close the doors for non-Muslims having sufficient knowledge of Islamic law to appear in the Shariah Court. If the intention and purpose of s 59 of the Act was to admit only Muslims having sufficient knowledge of Islamic law as a *peguam syarie*, the legislature would, instead of using the words 'any person', have used the words 'any Muslim' or words to that effect in s 59(1); and

(f) the rule of construction is 'to intend the Legislature to have meant what they have actually expressed'. The intention of Parliament must be deduced from the language used. The duty of the court is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act, which it may be called upon to interpret. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity. In the instant appeal, the Majlis and the attorney general had not convinced the Court of Appeal that it was the clear intention of the Act to admit only Muslims with sufficient knowledge of Islamic law as *peguam syarie*.

AT THE FEDERAL COURT

[14] On 28 January 2014, the Majlis and the attorney general were given leave by this court to appeal against the decision of the Court of Appeal on the following question of law which reads:

> Whether that part of Rule 10 of the Peguam Syarie Rules 1993 PU(A)408/1993 mandating that only Muslims can be admitted as peguam syarie is ultra vires the Administration of Islamic Law (Federal Territory) Act 1993. (The Ultra Vires Question)

[15] On 2 February 2015, this court during the course of submission on the ultra vires question had requested the parties to put in and also submit an additional question which reads:

> Whether that part of Rule 10 of the Peguam Syarie Rules 1993 PU(A)408/1993 mandating that only Muslims can be admitted as peguam syarie is in contravention of Article 8(1) and/or Article 8(2) and/or Article 5 and/or Article 10(1)(c) of the Federal Constitution and is as a consequence void. (The Constitutional Question)

[16] Thus, in order to understand the reasonings of the courts below and the submissions of the parties on these issues, it is necessary to reproduce s 59 of the Act as well as r 10 of the Rules. Section 59 of the Act reads:

> 59 Peguam syarie –
>
> (1) Subject to subsection (2), the Majlis may admit any person having sufficient knowledge of Islamic Law to be peguam syarie to represent parties in any proceedings before the Syariah Court.
>
> (2) The Majlis may, with the approval of the Yang di-Pertuan Agong, make rules-
>
> (a) to provide for the procedure, qualifications and fees for the admission

of *peguam syarie*; and

(b) to regulate, control and supervise the conduct of *peguam syarie*.

(3) Notwithstanding subsection (1), the Majlis may exempt any member of the Judicial and Legal Service of the Federation or any person appointed under section 3 of the Legal Aid Act 1971 from the provisions of this section.

(4) Notwithstanding anything contained in any other written law, no person other than peguam syarie or a person exempted under subsection (3) shall be entitled to appear in any Syariah Court on behalf of any party to any proceedings before it.

[17] The Majlis in exercise of its powers under s 59(2) of the Act had, in 1993 passed the Rules. Rule 10 of the Rules provides as follows:

10 A person may be admitted to be a peguam syarie if he –

(a)

(i) is a Muslim and has passed the final examinations which leads to the certificate of a bachelor's degree in Syariah from any university of any Islamic educational institution recognised by the Government of Malaysia; or

(ii) is a Muslim member of the judicial and legal service of the Federation; or

(iii) is a Muslim advocate and solicitor enrolled under the Legal Profession Act 1976; or

(iv) has served as a Syariah Judge or as a Kathi with any State Government in Malaysia for a period of not less than seven years;

(b) has attained the age of twenty-one years;

(c) is of good behavior and –

(i) has never been convicted in Malaysia or in any other place of any criminal offence;

(ii) has never been adjudged bankrupt;

(d) is a Malaysia citizen; and

(?) as an advocate and solicitor, has passed the Sijil Peguam Syarie examination.

THE ULTRA VIRES QUESTION

[18] In addressing this question, the issue before us is whether that part of r 10 of the Rules which imposes a condition that only a Muslim can be admitted and be allowed to practice as a *peguam syarie* is ultra vires s 59(1) of the Act. Learned counsel for the Majlis contended that the legislature in its wisdom had delegated the power to the Majlis to make rules regarding the qualifications of

a person for admission as a *peguam syarie*, as the Majlis is the proper body entrusted under the Act to advise the Yang Di-Pertuan Agong on matters relating to the religion of Islam (see s 4(1) of the Act).

[19] A stance has been taken by the Majlis and the attorney general that s 59(1) is not the conclusive provision for the definition of *peguam syarie*. Learned counsel for the Majlis highlighted that s 59(1) begins with the opening words 'subject to sub-s (2)'. In clear plain language, the provision must be read subject to sub-s (2). It means that the discretion of the Majlis to admit any person with sufficient knowledge of Islamic Law to be *peguam syarie* is subject to sub-s (2). It does not stand alone without condition. In its plain language s 59 itself clearly states that both the sub-s (1) and (2) must be read together, to determine the qualifications to become *peguam syarie*. Hence, according to learned counsel, to state that r 10 cannot go beyond the only qualification of sufficiency of knowledge in itself not only goes against what s 59(1) says, but also completely ignores the actual constitutional and legal reason why the other qualifications to become *peguam syarie* are left to the Majlis to make rules adding in to the other necessary qualifications.

[20] What was submitted above, is in line with the reasonings given by the learned High Court judge in holding that r 10 of the Rules is not ultra vires s 59(1) of the Act. The learned High Court judge in holding that r 10 is not ultra vires s 59(1) the Act held:

> [15] For the purpose of appreciating the application of rule 10 in relation to s 59(1) of Act 505, it is crucial to determine the ambit and the language used in the section. It must be noted that s 59(1) begins with the opening words 'subject to subsection (2), the Majlis may admit any person with sufficient knowledge of Islamic Law to be peguam syarie ... '. In clear plain language, the provision must be read subject to sub-s (2). It means that the discretion of the Majlis to admit any person with sufficient knowledge of Islamic Law to be peguam syarie is subject to sub-s (2). It does not stand alone without condition.
>
> [16] To my mind 'admission' is at the discretion of the Majlis because the word 'may' is used in s 59(1) of Act 505. The word 'may admit' denotes that it is not mandatory for the Majlis to admit a person solely on the basis of having sufficient knowledge of Islamic Law. In my view this provision must be read to mean that the Majlis in exercising its discretion is subject to the rules made under sub-s (2). So even if a person has sufficient knowledge of Islamic law, the Majlis may still decline an application for admission on other grounds and this could be for reasons stipulated in sub-s (2).
>
> [17] From my reading of these provisions the intent of the legislature is clear. In plain language of this provision alone I am unable to agree with the contention by Encik Ranjit Singh that, the words 'a person with sufficient knowledge of Islamic law' is all that is required for the purpose of admission under s 59(1). Such cannot be what s 59(1) contemplates. It is also clear that it is the intent of the legislature to delegate to the Majlis the power to determine the necessary qualification at its

> discretion. Hence the Majlis is empowered to add, vary or to limit the said qualification. Whether or not the imposition of the requirement that a person must be a Muslim is within the power of Majlis must therefore depend on the meaning of the word qualification used in that section. If the legislature had intended that knowledge of Islamic law per se is sufficient then s 59(1) would have been enacted to read instead, 'The Majlis shall admit any person having sufficient knowledge of Islamic Law … '. Since the opening words of s 59(1) begin with 'subject to sub-s (2)', it is clear that the qualification of a person with sufficient knowledge of Islamic Law in that s 59(1) is subject to the power given to the Majlis in subsection (2). That being the case, I hold that the Majlis is empowered by virtue of s 59(2) to regulate the qualification of a peguam syarie.

[21] In response, learned counsel for the respondent submitted that r 10 of the Rules is ultra vires the Act and that it has exceeded the limits prescribed by the Act by creating an inconsistency with it. On this basis learned counsel submitted that the Court of Appeal rightly held that the usage of the word 'any person' in s 59(1) of the Act in their natural meaning must mean any person, regardless of his or her religion. Learned counsel drew our attention to the fact that there is nothing in the Act to restrict the meaning of the words 'any person' to mean 'any Muslim'. Thus, any person, with sufficient knowledge of Islamic law may under s 59(1) be admitted as a *peguam syarie* at the discretion of the Majlis. Learned counsel submitted that the words 'subject to sub-s (2)' in s 59(1) of the Act cannot be relied on to validate r 10 of the Rules, as what the learned High Court judge did in this case. Learned counsel took a diametrically opposed view in that s 59(1) of the Act imposes only one condition to become *peguam syarie*, that is a person must have 'sufficient knowledge of Islamic law'. Learned counsel's stance is that the Rules was delegated to provide for the procedure, qualifications and fees for admission of *peguam syarie*. Being a delegated legislation, the Rules must fall within the scope of the power granted to it by the Act. In other words, delegated legislation cannot impose rules which are not authorised by the parent statute. In this regard it was submitted that the Court of Appeal had correctly analysed the interplay between the two sections when it concluded as follows:

> The phase, 'Subject to subsection 2' in section 59(1) of the Act does not make section 59(1) subservient to section 59(2) as contended by the Respondents. This is because 59(2) itself does not take away or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a peguam syarie. Section 52(2) is merely an enabling provision, which the legislature has conferred on the Majlis to make rules, with the approval of the Yang di Pertuan Agong, regulating the procedure and qualification for admission of peguam syarie.

[22] Learned counsel was of the view that the phase 'subject to sub-s (2)' is merely an enabler, enabling the Majlis to make rules pursuant to the said provision. The rules must, however, never be inconsistent with the main Act. The useage of the term 'Muslim' in r 10 is clearly a departure from the general

term 'any person with sufficient knowledge of Islamic law' used in the Act, and therefore is ultra vires the Act. In support learned counsel cited s 23(1) of the Interpretation Act 1948 and 1967 which reads as follows:

> Any subsidiary legislation that is inconsistent with an Act (including the Act under which subsidiary legislation was made) shall be void to the extent of the inconsistency.

[23] As we can see, clearly there is a sharp differing view as to the interpretation of the words 'subject to sub-s (2)' in s 59(1) of the Act.

[24] We are of the view that the words 'subject to' means conditional or dependent upon something. It implies that the application of s 59(1) of the Act is conditional and dependent upon the provision in s 59(2). In other words, as found by the learned High Court judge, s 59(1) does not stand alone on its own and must not be read on its own. Thus, the term 'subject to' is not merely an enabler as what had been ruled by the Court of Appeal. Rather, it complements the provision under s 59(2) of the Act. The application of s 59(1) of the Act will have to be subjected to the provisions under s 59(2). Thus, in our considered view the words 'subject to' must be a factor to be considered in interpreting any section in a statue.

[25] We found support for our view based on the decision of this court in *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713; [2009] 4 MLRA 265. Her Ladyship Heliliah Yusof FCJ speaking for the Federal Court had this to say:

> In the instant appeal there is only one section. Nevertheless while undue emphasis has been emplaced on the word 'may' in s 35 of the PKKM Act 1979 and the term 'intention of the legislature', scant regard has been paid to the opening words that also govern the application of the rest of the provision. The words that require to be addressed are: Notwithstanding the provisions of any other written law.

[26] In the above case, the Federal Court regarded the opening words 'notwithstanding the provisions of any written law' as a factor to be considered in interpreting a statue. In fact, it went on to state that the opening words govern the application of the rest of the provision.

[27] Similarly, in the present case, the term 'subject to' in the beginning of s 59(1) is not merely an enabler, but is an important part of the provision which may determine the manner in which the provision is to be read and construed. Thus, the term 'any person having sufficient knowledge of Islamic law' as found in s 59(1) is meant to be read subject to the powers of the Majlis pursuant to s 59(2) to make rules to provide for the procedures, qualifications and fees for the admission of *peguam syarie* in Wilayah Persekutuan.

[28] Although s 59(1) of the Act has provided a general condition that 'any person with sufficient knowledge of Islamic law' is eligible to become a *peguam syarie*, s 59(2) of the Act assigns the responsibility of determining the qualifications required for the admission as *peguam syarie* to the Majlis. Thus, we are of the view that s 59(1) must be read harmoniously with s 59(2)(a) where it clearly states the Majlis may make rules:

> (a) To provide for the procedures, qualifications and fees for the admission of peguam syarie.

Clearly, s 59(2)(a) above cloths the Majlis with the power to make rules pertaining to 'qualifications' for the admission of a *peguam syarie*. The word 'qualification' is not defined in the Act, nor the Interpretation Act 1948 and 1967. Therefore, it must be given its ordinary and plain meaning as prescribed in the English language. The learned High Court judge had dealt with this issue in the following manner:

> [19] For the purpose of determining the meaning of qualification in s 59(1), I am inclined to accept the submission of learned senior federal counsel that in absence of the definition of qualification in Act 505 or in the Interpretation Acts 1948 and 1967, the plain and ordinary meaning of the word is to be used, as decided in *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69. The dictionary meaning of word qualification are enumerated in the written submission of learned senior federal counsel. First, the meaning found in the *Concise Oxford English Dictionary*, (11th Ed), which states as this:
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> > Qualification: 1. The action of qualifying or the fact of becoming qualified. 2. a pass of an examination or an official completion of course. 3. a quality that qualifies someone for a job or activity. 4. a condition that must be fulfilled before a right can be acquired. 5. a statement or assertion that qualifies another.
> >
> > *Black's Law Dictionary*, (9th Ed), qualification means: Qualification: (16c) 1. The possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function <voter qualification requires one to meet residency, age, and registration requirement. (Cases: Officers and Public Employees 35.) 2. A modification or limitation of terms or language; esp., a restriction of terms that would otherwise be interpreted broadly <the contract container a qualification requiring the lessor's permission before exercising the right to sublet> 3. CHARACTERIZATION (I) -qualify, vb.
>
> [20] In summary the word qualification or kelayakan as used in s 59(2) is wide enough to include the possession of qualities or properties such as fitness or capacity which is inherently or legally necessary to enable one to be eligible for a position or office. This includes modification or limitation or restriction or even characterization. The same meaning is found in the P Ramanatha Aiyar's, *The Law Lexicon With Legal Maxim, Latin Terms and Words & Phrases*, (2nd Ed) 1977. Therefore in its plain and ordinary meaning the word, qualification is certainly wide enough to allow the Majlis to impose the condition appearing in r 10.

[29] We are in complete agreement with the approach taken by the learned High Court judge. We share the same view as the learned High Court judge that the word 'qualifications' used in s 59(2) is wide enough to enable the Majlis to impose the conditions appearing in r 10 of the Rules. As such, with respect, we find that the respondent's contention is untenable. As we have said earlier, s 59 of the Act cannot be interpreted by ignoring the plain and ordinary words employed therein, wherein the opening words in s 59(1) of the Act clearly states 'Subject to sub-s (2), the Majlis may admit any person having sufficient knowledge of Islamic law to be *peguam syarie* ... '.

[30] Hence, to state that r 10 cannot go beyond the only qualification of sufficiency of knowledge of Islamic law on itself not only goes against what s 59(1) of the Act says, but also completely ignores the legal reasoning why the other qualifications to become *peguam syarie* are left to the Majlis to make adding on the other necessary qualifications.

[31] The fallacy of the respondent's argument lies in the fact that undue emphasis had been placed on the word 'any person having sufficient knowledge of Islamic law' and scant regard has been paid to the opening words of s 59(1) of the Act where the rest of the provisions come into play through the usage of the word 'subject to'. As we have alluded to, s 59(1) of the Act is a general enabling legislation establishing the right of a *peguam syarie* to appear in the Syariah Courts. Section 59(2) on the other hand enables certain categories of officers who fulfils the prerequisites based on the Rules enacted by the Majlis to appear. Section 59(1) does not give exclusive right to anyone to appear as *peguam syarie* but rather subject to the restrictions in s 59(2). Section 59(2) of the Act carves out a limited exemption in so far as it limits the class of persons who are competent to appear as *peguam syarie*. The words 'subject to sub-s (2) of this Act' are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found. This line of statutory interpretation has been given judicial consideration in the case of *Government of the Federation of Malaya v Surinder Singh Kanda* [1961] 1 MLJ 121. Neal J in referring to the words of Maugham J, in *Re Dunkley v Sullivan* [1930] 1 Ch 84 where he held that the words, 'subject to the provisions contained in the will', must mean '*subject to all the provisions of the will which remain operative and effective*'. (Emphasis added.)

[32] Taking cue from the judgment of Neal J in *Government of the Federation of Malaya v Surinder Singh Kanda* we find that the Court of Appeal in the instant case had fallen into error when it wrongfully concluded that the phrase 'subject to sub-s (2)' in s 59(1) of the Act did not make s 59(1) subservient to s 59(2) because s 59(2) itself did not take away or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a *peguam syarie* and s 59(2) was merely an enabling provision which the legislature had

conferred on the Majlis to make rules regulating the procedure and qualification for admission of *peguam syarie* .

[33] We are inclined to agree with the views accorded by the learned High Court judge in that the conditions for admission of *peguam syarie* in s 59(1) can be referred to in simple language as 'necessary condition', but not 'sufficient condition' to qualify the person as a *peguam syarie* for the purpose of s 59 of the Act. The 'sufficient condition' would be satisfied if the person meets the further requirements under r 10 of the Rules, which was enacted pursuant to s 59(2) of the Act. Thus, the additional qualifications required by the Majlis under r 10, read together with the qualification of 'any person with sufficient knowledge of Islamic law' appearing in s 59(1) of the Act, would then complete the definition as to who may be appointed as a *peguam syarie* for the purposes of the Act.

[34] In the circumstances, we are unable to accede to the contentions urged upon us by learned counsel for the respondent that 'a person with sufficient knowledge of Islamic law' is all which is required for the purpose of admission under s 59(1) of the Act. For the reasons stated earlier, clearly such cannot be what s 59(1) contemplates. It is pertinent to note that the qualification under r 10 of the Rules is not limited to merely the faith of the person as a Muslim. Rule 10 also provides other conditions such as the minimum age of 21 years, record of no conviction of criminal offence, record of solvency, a Malaysian citizen, an advocate and solicitor, and a condition of having passed the *Sijil Peguam Syarie* examination. With respect, if going by the contention of learned counsel for the respondent that the Majlis cannot prescribe the faith of a person to be a Muslim to be a *peguam syarie*, then surely what the respondent is saying is that the Majlis also cannot prescribe other conditions which appear in r 10 of the Rules. Thus, to interpret 'any person having sufficient knowledge of Islamic law' in s 59(1) of the Act, as the only requirement to be admitted as *peguam syarie* would be repugnant to the intention of the Act and lead to some manifest absurdity.

[35] Based on the aforesaid reasons, we find that, that part of r 10 of the Rules mandating that only Muslims can be admitted as *peguam syarie* is not ultra vires s 59(1) of the Act. We shall therefore answer this question posed in the negative.

THE CONSTITUTIONAL QUESTION

[36] Rule 10 of the Rules provides for the qualifications of a *peguam syarie*. The issue is whether r 10 of the Rules, mandating that only Muslims can be admitted as *peguam syarie* is in contravention of art 8(1) and/or art 8(2) and/or artt 5 and/or art 10(1)(c) of the Federal Constitution.

[37] In addressing this issue, learned counsel for the Majlis submitted that r 10 of the Rules cannot be read subject to the liberty clauses under the Federal Constitution. To exemplify this contention learned counsel stressed that most states enactments and/or rules contain provisions restricting and/or limiting any acts and conducts of any individual Muslim professing the religion of Islam which is contrary to the precept of Islam. As such, learned counsel advocated that a harmonious rule of interpretation must be applied in interpreting the Federal Constitution. In other words, those enactments on Islamic Law passed by the states must be taken for all intent and purposes not to be subjected to the liberty clauses. Otherwise, learned counsel submitted, those intended powers of the states to enact Islamic laws would be resigned to redundancy. Learned counsel referred to the cases of *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 and *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 as authorities to support his proposition.

[38] On the discrimination point under art 8 of the Federal Constitution, learned counsel for the Majlis submitted that art 8(1) of the Federal Constitution does not preclude the making of reasonable classification of categories, so long as there is no discrimination among the members of that category. The object of the Act is to enforce and administer Islamic Law, the constitution and organisation of the Syariah Courts. If the Legislature deems it necessary that for the purpose of achieving the object of Act, it requires a rule that only a Muslim may be admitted as *peguam syarie*, and that rule is made directed to the problem and that it discriminates on adequate grounds, then the law does not violate art 8 of the Federal Constitution. It is therefore good law (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257).

[39] In relation to art 5(1) of the Federal Constitution, learned counsel's bone of contention is that by applying the principle stated in the cases of *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 and *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204, the fundamental right under art 5(1) of the Federal Constitution is not absolute and this right can be taken away by law duly passed by Parliament. Thus, r 10 of the Rules is therefore valid law (see also *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72).

[40] In addressing the equality provisions under the Federal Constitution, learned counsel for the respondent emphasised on the fact that a law that discriminates is good law if it is based on reasonable or permissible classification. The test for 'reasonable classification' is that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that differentia must have a rational

relation to the object sought to be achieved by the Act (see case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155).

[41] Anchored on the above authority, learned counsel for the respondent emphasised that the classification thus must not be arbitrary, artificial or evasive but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[42] Having discussed the above principles on discrimination at length, learned counsel for the respondent concluded by stating that the imposition that *peguam syarie* can only be Muslims has no nexus to the object of the Act. Having a *peguam syarie* who are non Muslims does not detract from nor is it inconsistent with the enforcement of the administration of Islamic Law or the organisation of Syariah Courts. The object of s 59(1) of the Act is to ensure competency in Islamic law to practice as a *peguam syarie*. It is all about academic knowledge and not a person's religious faith. In the circumstances, learned counsel submitted that the prohibition against non-Muslims for admission as a *peguam syarie* is therefore arbitrary and unreasonable.

[43] In the instant case the High Court held that r 10 of the Rules was not in contravention with the liberty and equality clauses under the Federal Constitution. The Court of Appeal did not rule on this issue. It is for that reason we invited parties to pose this constitutional question in order to avoid the case being send back to the Court of Appeal to decide on this issue later if the Majlis and the attorney general succeeded on the ultra vires question.

[44] We will first deal with art 8 of the Federal Constitution which provides as follows.

> Equality
>
> 8 (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.
>
> (4) No public authority shall discriminate against any person on the ground that he

is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit –

(a) any provision regulating personal law;

(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land)or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

[45] The law on art 8 of the Federal Constitution is settled. A law that discriminates is good law if it is based on reasonable or permissible classification. The governing principles of law on art 8 of the Federal Constitution was succinctly laid down in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* AIR 1958 SC 538, held that a law that discriminates is good law if it is based on reasonable or permissible classification. Two conditions must be satisfied, that is:

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

[46] The doctrine of reasonable classification has been accepted and applied by our courts in the cases of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166, *Abdul Ghani bin Ali Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561; [2001] 3 CLJ 769, *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Interverner)* [2004] 2 MLJ 257, *Badan Peguam*

Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507. In fact in the very recent case of *Lembaga Minyak Sawit Malaysia v Arunamari Plantation Sdn Bhd & Ors and Another Appeal* [2015] 4 MLJ 701; [2015] 5 MLRA 1 this court in referring to the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 had this to say:

> [43] It is given that art 8 of the Constitution guarantees that all persons are equal before the law and entitled for equal protection of the law. The jurisprudence relating to art 8 of the Constitution has been aptly discussed and summarised in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155. In that case one of the issues raised was that s 418 of the Criminal Procedure Code (under the provisions of which the case was transferred from the subordinate court to the High Court for trial) was inconsistent with art 8 of the Constitution and therefore void by virtue of art 4. Suffian LP, in dealing with this issue, had laid down the principles of equality in the Malaysian context in this way:
>
> > 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
> >
> > 2. The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and art 153.
> >
> > 3. The prohibition or unequal treatment applies not only to the legislature but also to the executive – this is seen from the use of the word 'public authority' in cl (4) and 'practice' in clause (5)(b) of art 8.
> >
> > 4. The prohibition applies to both substantive and procedural law.
> >
> > 5. Article 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para (b) of cl (5) of art 8); aborigines as opposed to others (para c)); residents in a particular State as opposed to residents elsewhere (para d)); and Malays and natives of Borneo as opposed to others who are not (art 153).
> >
> > 6. ... the first question we should ask is, is the law discriminatory, and that the answer should then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the Constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and ifit is not, the law is void.
> >
> > 7. ... discriminatory law is good law if it's based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced the judgment in *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors* [1958] AIR 538, provided that:
> >
> > (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

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(ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

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8. Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law

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itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself affect the validity of the law ...

D

9. In considering art 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy.

10. Mere minor differences between two procedures are not enough to invoke

E

the inhibition of the equality clause.

[44] The jurisprudence relating to art 8 of the Constitution was further propounded in the case of *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165. There, Salleh Abas LP in his dissenting judgment stated as follows at pp 722–723:

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The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the law so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as, inter alia, age, ability, education, height, size, colour, wealth, occupation, race and religion. Any law made by a legislature must of

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necessity involve the making of a choice and differences as regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation, the difference and therefore the law which

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contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is known as the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause. Its classic rendering is well summarised in *Lindley v National Carbonic Gas Co* [1911] 220 US 61, pp 76–79, 55 L Ed 369

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(this case should be cited as *Lindley v Natural Carbonic Gas Co*), in the following terms:

1. The equal protection clause of the 14th amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is

done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

3. When the classification in such a law is called in question, it any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

[47] From the above cases, it is trite law that classification for the purpose of discrimination is permissible. However, the classification must have rational relation to the object sought to be achieved by the law in question for it to become a valid law. Whether a particular classification is rational or not, it is necessary to look at the object and intent of such laws and the Rules drafted thereunder.

[48] In the context of the present case, in order to appreciate the real intent and object of the law, it is crucial to look at the whole scheme of the Act. It is clear that the object of the Act is to enforce and administer Islamic law as well as to provide for the constitutional and organisation of the Syariah Court. It is a common ground that the Syariah Court has jurisdiction only over persons professing the religion of Islam. Hence, the persons appearing before the Syariah Court therefore should also be subjected to its jurisdiction. The Syariah Court must be able to enforce its laws and rules on a *peguam syarie*, as for instance, when contempt or any breach of the rules is committed by any party. Surely, the Syariah Court would not be able to enforce its laws and rules against the respondent, as she a non-Muslim. The Syariah Court has no jurisdiction against her.

[49] The High Court judge in addressing this issue made the following observation:

> The laws are therefore made directed to the problem, manifests by experience and that it discriminates on adequate grounds. Thus, if the Legislature deems it necessary that for the purpose of achieving the object of Act 505, it requires a rule that only a Muslim may be admitted as peguam syarie and that rule is made directed to a problem, manifest by experience and that it discriminates on adequate ground, then the law does not violate Art 3 of the Federal Constitution. It is therefore a good law.

[50] We are incline to agree with the observation made by the learned High

Court judge. As we have stated earlier, the object of the Act relates to the enforcement and administration of Islamic Laws, the constitution and organisation of Syariah Courts and related matters in Wilayah Persekutuan. The enforcement and the organisation of the Syariah Court include having competent and qualified prosecutors and religious enforcement officers and legal representation by qualified *peguam syarie*. The Majlis in exercising its delegated power made rules, inter alia , that only a Muslim may be admitted as *peguam syarie*. The power to legislate based on the empowering provision and the broad meaning of the word qualification allows the Majlis to impose a condition that only a Muslim may be admitted as *peguam syarie*. Thus, if the legislature deems it necessary that for the purpose of achieving the object of Act, it requires a rule that only a Muslim may be admitted as *peguam syarie* and that rule is made directed to the problem, and it discriminates on adequate grounds, then the law does not violate art 8 of the Federal Constitution. It is therefore a good law.

[51] Further having a *peguam syarie* who professes the religion of Islam is important to achieve the object of the Act. Faith here being the cornerstone is necessary to achieve the object of the Act. It must be noted that one of the important duties of a *peguam syarie* is to assist the Syariah Court in upholding the Syariah Law. First and foremost, the profession is based on the concept of Islamic belief in Allah. One of the most important criteria which makes an upright and virtuous *peguam syarie* is for the lawyer to have 'Aqidah', which means belief with certainty and conviction in one's heart and soul in Allah and His divine Law. Thus, from the perspective of Syariah, it is fundamentally crucial for *peguam syarie* to be selected among the Muslims and only those who have faith in the religion of Islam and who are able to perform their duties with full conviction of that belief. With due respect to the respondent, she is of the Christian faith. Her faith is surely in conflict with the Muslim 'Aqidah'. In that sense, how is she to fulfill her duty to assist the Syariah Court in upholding the Syariah Law?

[52] Thus, in our judgment we find that the classification can be regarded as reasonable as there is nexus between the impugned rule and the object of the Act. It is therefore our considered view that the impugned r 10, does not contravene art 8 of the Federal Constitution and is therefore not unconstitutional.

[53] It was also submitted by learned counsel for the respondent that r 10 of the Rules, which imposes a restriction that a person must be a Muslim in order to become a *peguam syarie* render her fundamental right to livelihood under art 5 of the Federal Constitution ineffective or illusory. Further, it was submitted that r 10 of the Rules is unconstitutional since it infringes art 10(1)(c) of the Federal Constitution.

[54] The High Court in dealing with these issues held as follows:

> [42] Though art 5 and art 10 of the Federal Constitution were raised by the applicant, however these two areas of the Constitution were not central to the challenge posed by the applicant. For completeness however, on art 5 the Federal Court case of *Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1; [2010] 3 CLJ 643 has erased doubts on the meaning of the right to life in art 5(1).
>
> The Federal Court uses the definition of 'life' in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan 9 MLJ 194 at 212* [2002] 3 MLJ 72;; [2002] 4 CLJ 105, to exclude the right to livelihood. Thus the allegation by the applicant on the loss of the livelihood is misplaced because the applicant is not deprived to practice her profession as an advocate and solicitor in the civil court. The relationship between art 5(1) and art 8(1) is best summed up in *Sivarasa Rasiah b Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 as this:
>
> > ... it is clear from the authorities thus far discussed that 'in accordance with law' in art 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be. So long as the law does not produce any unfair discrimination it must be upheld. This is the effect of the equality limb art 8(1) ... if s 46A passes the test of the fairness as housed in the equality clause then it is a fair law and therefore is a valid law for the purposes of art 5(1) ...

[55] We cannot help but agree with the observations made by the learned High Court judge. With respect, the issue on the deprivation of the respondent's livelihood is misplaced as based on the facts of this case the respondent is not deprived of her law practice in the civil court.

[56] We are also of the view that the respondent's reliance on art 10(1)(c) is without any merit. Article 10(1)(c) provides:

> (1) Subject to Clauses (2), (3) and (4) –
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.

[57] It is clear that art 10(1)(c) refers specifically to the 'right to form associations', and not to the right to be a member of any profession or association. Thus, the respondent's reliance on art 10(1)(c) is also misplaced.

[58] Based on the forgoing, we hold that r 10 of the Rules mandating that only Muslim can be admitted as *peguam syarie* is not in contravention with arts 5, 8(1) and 10(1)(c) of the Federal Constitution. We shall therefore answer the question posed in the negative.

A CONCLUSION

[59] In the final analysis, we find that r 10 of the Rules mandating that only Muslims can be admitted as *peguam syarie* is not ultra vires the Act. Further, that part of r 10 of the Rules mandating that only Muslims can be admitted as *peguam syarie*, is not in contravention of arts 5, 8(1), or 10(1)(c) of the Federal Constitution.

[60] For the reasons adumbrated above, we accordingly allow the appeals. The orders of the Court of Appeal are hereby set aside. We reinstate the orders of the High Court. As agreed by the parties, we make no order as to costs.

Suriyadi FCJ (delivering dissenting judgment of the court):

[61] The respondent is an advocate and solicitor of the High Court of Malaya and a holder of Diploma in Syariah Law and Practice ('DSLP') conferred by the International Islamic University Malaysia.

[62] She is a Christian.

[63] The Majlis Agama Islam Wilayah Persekutuan is a body incorporated under the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) ('the Act'), and is charged under s 59 of the Act with the power to admit syarie lawyers ('*peguam syarie*') to represent parties in any proceedings before the Syariah Courts, in the Federal Territories ('Wilayah Persekutuan'). Another incidental appellant, the attorney general, represents Wilayah Persekutuan. Thenceforth the Majlis Agama Islam Wilayah will be referred to as the appellant unless stated otherwise.

[64] By a letter dated 24 August 2009 the respondent applied to be admitted as a *peguam syarie* in Wilayah Persekutuan. However before her application was processed, it was rejected by the 'Jawatankuasa *peguam syarie*', an entity under the appellant's jurisdiction, vide a letter dated 9 September 2009, on the ground that she is not a Muslim.

[65] On 23 October 2009, the respondent applied to the High Court for a judicial review and sought a few orders, namely a declaratory order, an order of certiorari and an order of mandamus. In that declaratory prayer, the respondent sought a declaration that *kaedah* 10 (r 10) of the Kaedah-Kaedah Peguam Syarie 1993 is ultra vires the Act, and also in contravention of art 8(1) and/or art 8(2) and/or art 5 and/or art 10(1) (c) of the Federal Constitution, and as a consequence void.

[66] Hereinafter, any reference to an article refers to the Federal Constitution. For brevity any reference to ss 59(1) and (2) will relate to the Act.

[67] Chronologically, on 14 May 2010 leave for the judicial review application was granted. The appellants' application under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out the respondent's application for that judicial review was dismissed on 17 March 2011. The High Court judge dismissed the striking out application on jurisdictional grounds.

[68] The High Court also dismissed the respondent's application for judicial review, on the ground that the appellant is empowered under s 59(2) to make rules relating to the qualifications of admission of persons as *peguam syarie*, including the power to impose the condition that a *peguam syarie* applicant must be a Muslim.

[69] Being dissatisfied, the appellant appealed to the Court of Appeal on 25 May 2011. On 21 June 2013, the Court of Appeal allowed the respondent's appeal and declared that r 10 is ultra vires the Act.

[70] Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave to the Federal Court. On 28 January 2014 the appellant successfully obtained leave from us on the following questions of law:

(a) whether or not 'kaedah 10' (r 10) of the 'Kaedah-Kaedah Peguam Syarie 1993 PU(A) 408/1993' is ultra vires the 'Administration of Islamic Law (Federal Territories) Act 1993' (the ultra vires question); and

(b) whether or not 'kaedah 10' of the 'Kaedah-kaedah Peguam Syarie 1993 PU(A) 408/1993' is in contravention of art 8(1) and/or art 8(2) and/or art 5 and/or art 10(1)(c) of the Federal Constitution ('the constitutional question')

THE APPELLANT'S SUBMISSION

[71] The appellant began by submitting that s 59(1) is the empowering section, and pursuant to s 59(2) of the Kaedah-Kaedah Peguam Syarie was promulgated. Rule 10 provides that only Muslims may be admitted as a *peguam syarie*.

[72] The appellant submitted that by reading s 59(1) together with s 59(2), in its plain and ordinary meaning, s 59 (1) is not the conclusive provision for the definition of *peguam syarie*. The powers given to the appellant to determine the qualifications of a *peguam syarie* under s 59(1) must be read subject to s 59(2). It was submitted that the discretion of the appellant to admit any person with sufficient knowledge of Islamic Law to be '*peguam syarie*' is subject to that

sub-s (2) and thus did not stand alone without condition.

[73] The appellant submitted that it is obvious that s 59(2)(a) empowers the appellant to make rules pertaining to qualifications for the admission of *peguam syarie*. Further, the word 'qualifications' is neither defined in the Act nor the Interpretation Acts 1948 and 1967. It was also pointed out by the appellant that s 59(1) is only a 'necessary definition' section, but not a 'sufficient definition' section, of *peguam syarie*.

[74] It was submitted that r 10 will then complete the definition as to who qualifies to be a '*peguam syarie*' for purposes of the Act, ie the basis for rejecting the respondent's application for admission. In short her unsuccessful application as a *peguam syarie*, on the premise that she is not a Muslim, is in order.

[75] The appellant submitted that the learned judge of the High Court was correct in deciding that s 59(1) must be read together with s 59(2). The rationale behind the view is that s 59(1) begins with the opening words 'subject to sub-s (2), the Majlis may admit any person with sufficient knowledge of Islamic Law to be *peguam syarie* ... '. Learned counsel for the appellant ventilated that due to the clear and plain language of s 59(1) it thus must be read subject to s 59(2). In short, the discretion of the appellant to admit any person with sufficient knowledge of Islamic Law to be a *peguam syarie* is subject to sub-s (2).

[76] It was submitted that the appellant in its wisdom, based on its interpretation of the Syariah law, saw it fit to require such qualification as stipulated in r 10. In such a circumstance it is therefore improper for the court to doubt or question the wisdom of the appellant in imposing such a condition.

[77] In support of its argument, the appellant submitted that Parliament is the legislative body of the Federation, and Parliament cannot pass a law which is within the power of the State Legislature (see *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119). Applying the above principle, the appellant argued that Parliament has no jurisdiction to legislate on matters pertaining to Syariah matters, a right that is conferred on the State Legislature under Item (1) and List II of the Ninth Schedule to the Federal Constitution.

[78] The appellant ventilated that s 59(2) has conferred power on the appellant, being the religious authority in Syariah matters, to decide on issues pertaining to Hukum Syarak. In this regard Parliament may not be the appropriate body to determine or even appreciate matters of Syariah. Thus for all intents and purposes, the appellant in exercising its legislative powers conferred by Parliament when legislating rules pertaining to the qualifications

of *peguam syarie*, has acted on its own interpretation of the Syariah. A

[79] The appellant further submitted that the disparity of practice in different states in relation to the admission of *peguam syarie* (eg the state of Selangor and Kelantan where non-Muslims are allowed to be *peguam syarie*) could be justified on the premise that there are more than one acceptable Syariah interpretation. It is entirely up to each State Legislature, in its wisdom, to choose the interpretation it deems fit and appropriate for that state. B

[80] It was the contention of the appellant that the purposive interpretation warrants that a *peguam syarie* must be a Muslim. In the first place, the Syariah Court has jurisdiction only over persons professing the religion of Islam (see para 1, List II, the Ninth Schedule of the Federal Constitution). Further, it was explained that the Syariah Court must be able to enforce its laws and rules on a *peguam syarie* when the need arises, say, when contempt or any breach of the rules has been committed in that court. Any non-Muslim *peguam syarie* will surely be outside the jurisdiction of the Syariah judge if such a breach were to have been committed in that Syariah Court. C D

[81] The appellant further contended that, apart from the requirement provided for in s 59(1), r 10 provides for at least four additional qualifications, aside from the faith qualification, namely, age qualification (r 10(b)), non-conviction and non-bankrupt qualification (r 10(c)), citizenship qualification (r 10(d)) and certificate qualification (r 10(e)). In a gist, it was argued that the faith qualification legislated in r 10 does not run counter the Act. E F

[82] Learned counsel for the appellant contended that the appellant's power to legislate on the qualification of a *peguam syarie* is based on Islamic Jurisprudence. This contention is highlighted in the judgment of the High Court wherein it was held that the decision of the appellant is founded on some Syariah principle as laid down in the decision of the *Muzakarah Jawatankuasa Fatwa 9 Majlis Kebangsaan* and also *Siti Nurhayati bt Mohd Daud v Dato' Mohd Zaidi bin Mohd JH XX11 1/1 1428H* (a decision of the Syariah High Court). G H

[83] Further it was argued that the appellant's power to make rules pursuant to s 59(2) will not be invalidated on ground of unconstitutionality. The appellant highlighted that art 8(5) provides lawful discrimination based on classification, where it provides: I

> (5) This Article does not invalidate or prohibit –
>
> (a) any provision regulating personal law;
>
> (b) any provision or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any

religion, to persons professing that religion ... ;

[84] In order to ascertain whether a classification is permissible or not the appellant referred to the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 at pp 165–166. The relevant part reads as follows:

> 1. The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.
>
> 2. The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.
>
> 3. The prohibition or unequal treatment applies not only to the legislature but also to the executive – this is seen from the use of the words 'public authority' in clause (4) and 'practice' in clause (5)(b) of Article 8.
>
> 4. The prohibition applies to both substantive and procedural law.
>
> 5. Article 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para (b) of clause (5) of Article 8), aborigines as opposed to others (para (c)); residents in a particular State as opposed to residents elsewhere (para (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153) ...

[85] The appellant made reference to various articles, amongst them an article written by Dr Mohamad bin Arifin titled 'Islam Dalam Perlembagaan Persekutuan' and an article written by Mohamed Ismail bin Mohamed Shariff titled *'The Legislative Jurisdiction of the Federal Parliament in Matters Involving Islamic Law' [2005] 3 MLJ cv*. These articles were adduced in order to support the notion that Islamic law relates to the personal and family law of Muslims, with cl 74(4) of the Federal Constitution further emphasising that Islamic Law applicable to Muslims should not just be confined to matters of Islamic personal law but to include also other Islamic personal laws not so enumerated in para 1 of the Ninth Schedule of the Federal Constitution.

[86] In relation to art 5(1), by applying the principles in *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133 and *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206, the appellant submitted that the fundamental right thereunder is not absolute, and such right may be taken away in accordance with law/duly passed by Parliament.

[87] It was submitted that the learned judge of the High Court was correct in deciding that the allegation by the respondent of a loss of her livelihood was totally misplaced. This is so as the respondent is not prevented from practising her profession as an advocate and solicitor in the civil court. There is therefore

no unfair discrimination here whether under art 8(1) or art 5(1).

[88] Learned counsel for the appellant further argued that art 10(1)(c) is inapplicable as that provision refers specifically to the right to form associations, and not to the right to be a member of any profession or association.

THE RESPONDENT'S SUBMISSION

[89] Learned counsel for the respondent argued that the only requirement stipulated under s 59(1), for a person to be accepted as a *peguam syarie* is, ' … any person having sufficient knowledge of Islamic Law'. As singular as that. Section 59(2) is merely an enabling provision for the appellant to make 'Kaedah-Kaedah' ('the rules') to regulate the procedure and qualifications for admission as a *peguam syarie*.

[90] With rule 10 being made pursuant to s 59(2) it thus cannot go beyond the qualification of sufficiency of knowledge in Islamic Law. By no account, as submitted by the respondent, could the appellant by way of a subsidiary legislation make rules inconsistent with s 59(1).

[91] That being so, that part of rule 10 currently under scrutiny is ultra vires the Act and therefore liable to be declared void. It has exceeded the limits prescribed by the parent law by creating an inconsistency with it. The respondent relied on s 23 of the Interpretation Acts 1948 and 1967 to support its application.

[92] On the constitutional aspect, learned counsel for the respondent began by alluding to art 8(1), which provides that all persons are equal before the law, and entitled to the equal protection of the law.

[93] Going further, learned counsel ventilated that art 8(2) prohibits any discrimination against citizens on the ground only of religion, race, descent … or carrying on any trade, business, profession, vocation or employment except as expressly authorised by the constitution.

[94] The gist of the respondent's contention was that art 8(1) is wide enough to cover any form of discrimination. It was submitted that as a citizen she is entitled to plead art 8(2), as she is discriminated against on the ground of religion, in pursuance of her profession as a *peguam syarie*.

[95] It was further argued that art 8(5)(a) has no application in the present case, as practising law is a profession; it being neither an office nor employment.

[96] The respondent concedes that lawful discrimination is allowed but must be based on reasonable classification, and for purposes of this appeal, any provision regulating personal law, any provision or practice restricting office or employment, connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

[97] To satisfy the classification two conditions have to fulfilled, namely:

(a) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and

(b) that differentia must have a rational relation to the object sought to be achieved by the Act.

[98] As far as the respondent was concerned the appellants failed to satisfy the two conditions.

[99] It was the submission of the respondent that the object of s 59(1) is to ensure competency in Islamic Law to practise as a *peguam syarie*. It is all about academic knowledge and not about a person's religious faith.

[100] The respondent also fell back on art 5 which provides that no person shall be deprived of his life or personal liberty save in accordance with law. In this connection the right to life includes the right to livelihood. It was contended that r 10, which imposes a restriction that a person must be a Muslim in order to be admitted as a *peguam syarie*, renders her fundamental right to livelihood ineffective or illusory.

[101] The respondent also argued on art 10(1)(c) though not forcefully.

[102] The respondent submitted that the constitutional guarantee of fundamental liberties, which is housed in Part II of the Federal Constitution, plainly states that the articles therein apply to all persons or citizens as the case may be, regardless of their race, religion, gender etc.

MY ANALYSIS

[103] Section 59 reads as follows:

> 59 peguam syarie –
>
> (1) Subject to subsection (2), the Majlis may admit any person having sufficient knowledge of Islamic Law to be peguam syarie to represent parties in any proceedings before the Syariah Court.
>
> (2) The Majlis may, with the approval of the Yang di-Pertuan Agong, make rules-

(a) to provide for the procedure, qualifications and fees for the admission of peguam syarie; and

(b) to regulate, control and supervise the conduct of peguam syarie.

[104] The Court of Appeal in its grounds of judgment, when discussing the words 'any person' as legislated in s 59(1), had earlier opined:

> In the absence of any definition, the words 'any person' in section 59(1) in their natural meaning must mean any person, regardless of his or her religion. There is nothing in the Act to restrict the meaning of the words 'any person' to mean 'any Muslim'. Thus, any person, with sufficient knowledge of Islamic Law may under section 59(1) be admitted as a peguam syarie at the discretion of the Majlis.

[105] A plain reading of s 59(1) has kept the qualification open, with the prerequisite being only of 'any person' with sufficient knowledge of Islamic law. The appellant, pursuant to its rule-making power, subsequently imposed a restriction by demanding that to succeed in his admission application as a *peguam syarie* an applicant must first be a Muslim. In a word being sufficiently knowledgeable of Islamic Law did not suffice.

[106] The restriction imposed by the appellant is reflected in r 10 which reads:

> 10 A person may be admitted to be a peguam syarie if he –
>
> (a) (i) is a Muslim and has passed the final examinations which leads to the certificate of a bachelor's degree in Syariah from any university of any Islamic educational institution recognised by the Government of Malaysia;
>
> (ii) is a Muslim member of the Judicial and Legal service of the Federation; or
>
> (iii) is a Muslim advocate and solicitor enrolled under the Legal Profession Act 1976; or
>
> (iv) has served as a Syarie Judge or as a Kathi with any State Government in Malaysia for a period of not less than seven years;
>
> (b) has attained the age of twenty-one years;
>
> (c) is of good behavior and –
>
> (i) has never been convicted in Malaysia or in any other place of any criminal offence;
>
> (ii) has never been adjudged bankrupt
>
> (d) is a Malaysian citizen; and
>
> (e) as an advocate and solicitor, has passed the Sijil Peguam Syarie examination.

[107] Section 59(2) is an enabling provision to make rules. Rules by their

very nature, are meant to be facilitative of a substantive right conferred by a parent Act, and not meant to whittle down the operation of the relevant provision of an Act.

[108] Shorn of all the frills, with the introduction of r 10 in the current format, the appellant has now rewritten s 59(1) by effectively making it read, 'any Muslim with sufficient knowledge of Islamic law' may become a *peguam syarie*. It is clearly a case of a subsidiary legislation subjugating a parent legislation. Now, a non-Muslim, in this case a Christian, however academically endowed, is effectively barred from applying to be a *peguam syarie*.

[109] The application of the respondent brought into focus s 17A of the Interpretation Acts 1948 and 1967, which enjoins a purposive reading to be undertaken when interpreting a statute. Any literal and blinkered approach must now compete with the context and purpose of the Act as legislated by Parliament. *Tenaga Nasional Bhd v Ong See Teong & Anor (suing on their behalf and for all parties who are the owners or tenants of the Kampung Sungai Terentang – which was served with a notice under ss 13 and 16 of the Electricity Supply Act 1990)* [2010] 2 MLJ 155 made it abundantly clear that what must prevail is a construction that will promote the purpose of an Act. Even taxing statutes have not escaped this approach as reflected by case laws (*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97). In *T Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 Lord Wilberforce on the general approach to construction said:

> What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded.

[110] The relevancy of *Hansard* cannot be underestimated en route to ascertaining the true meaning of s 59(1) and the purport of the Act. Lord Griffith in *Pepper v Hart* [1993] AC 593 had occasion to state:

> The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult *Hansard* to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. (Emphasis supplied.)

[111] In as much as allowances have been made when resorting to the *Hansard* report as an aid of statutory construction, this report is not determinative of its meaning, but merely to help construe ambiguous and obscure provisions in order to avoid absurdities. The words of the statute can never be substituted by the words of the Minister (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345). When there is no ambiguity in a provision, what with a purposive construction being a statutory demand currently, a court must give effect to that piece of legislation.

[112] I now reproduce the relevant extracts from *Hansard*, especially the part when moving the second reading of the Bill to amend s 59 of the Act on 14 August 1995, where the then the Minister in the Prime Minister's Department (Dato' Dr Hj Abdul Hamid bin Hj Othman) at p 48 said:

> Seksyen 59 pula telah dipinda keseluruhannya di mana di dalam peruntukan ini diberi kuasa kepada Majlis untuk melantik mana-mana orang yang mempunyai pengetahuan mengenai hukum syarak yang mencukupi menjadi peguam syarie bagi mengendalikan kes-kes di Mahkamah Syariah.

[113] On his winding-up speech on 16 August 1995, at the conclusion debate of the said Amendment Bill, the minister stated as follows at pp 21–22:

> Bagi perkara peguam syarie, dengan adanya pindaan ini, maka di Wilayah Persekutuan seorang peguam boleh mewakili anak guamnya *walaupun dia bukan beragama Islam.* Ini akan dimasukkan dalam senarai tetapi mereka mestilah lulus di dalam peperiksaan ataupun ujian-ujian yang ditentukan. Ini adalah selaras dengan kehendak kita pada hari ini bahawa amalan undang-undang dan keadilan di negara kita mestilah betul dan lurus dan ini sesuai pula dengan adanya Universiti Islam Antarabangsa memberi kursus undang-undang syarak kepada mahasiswa-mahasiswa yang tidak beragama Islam. (Emphasis added.)

[114] In *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39, when delivering the judgment of the then Supreme Court (at pp 39 and 40), Seah SCJ took the opportunity to state:

> It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of Act in accordance with the settled rules of construction ...

[115] In *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 this court had occasion to refer to *NKM Holdings Sdn Bhd* and the above statement. In *Metramac* it was also said, at p 200:

Thus when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at pages 161–162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.

The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v Singhai Kepurchand* [1976] Jab LJ 340).

[116] With the *Hansard* report clearly evincing that it was never the intention of Parliament to shut the doors to academically endowed non-Muslims having sufficient knowledge of Islamic law to appear in any Syariah Court, and s 59(1) in its ordinary and natural sense easily understood, it is thus the primary duty of the court to give effect to the intention of Parliament. Applying the plain meaning rule, the 'enlarged' words of 'any person', by plain and simple reading must include any person regardless of his or her religion (*Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69). Had it been the intention of Parliament to merely allow Muslims to be *peguam syarie*, that religious requirement could have been inserted in s 59(1) without much hassle. This has been done in s 10 of the Act where detailed provisions have been included to ensure that where an ex-officio member of the Majlis is not a Muslim, he is replaced in the Majlis by 'another officer who is a Muslim and next in seniority from the same department or ministry'. Similarly, in s 42, Parliament saw it fit to specify that the Syariah Appeal Court members are to be chosen from a standing panel of 'not more than seven Muslims'. Once the meaning and intention of a statute are clear, it is not the province of the court to find another intention of Parliament. Its duty is to enforce the clear words.

[117] A cursory perusal of the impugned part of r 10 (para 46 above) shows that it is not in sync with the object of the Act, as the importation of a religious requirement in this subsidiary piece of legislation without more, has disqualified an otherwise eligible candidate here. More of this later.

ULTRA VIRES POINT

[118] Has r 10 exceeded the limits prescribed by the Act and created an inconsistency with s 59(1)?

[119] Section 23 of the Interpretation Acts 1948 and 1967 is relevant in this regard and it reads: A

> Avoidance of subsidiary legislation in case of inconsistency with Act
>
> 23 (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency. B

[120] I now discuss a few authorities. In *Ira & AC Berk Ltd v Commonwealth of Australia* [1930] 30 SR (NSW) 119 the parent law provides for an entitlement of a refund of payment under certain circumstances, but subsequently restricted by rules made pursuant to that parent law. The restriction came in the form of an imposition of time limit in order to qualify for that refund. The court held that such restrictive rules were ultra vires the parent law. C D

[121] In *Bharat Barrel & Drum Manufacturing Co Pte Ltd v Employees State Insurance Corporation* AIR 1972 SC 1935 the Indian Supreme Court there held that substantive rights conferred by the principal Act could not be curtailed or restricted by a subordinate piece of legislation. E

[122] In *Taylor v Dental Board of South Australia* [1940] SASR 306, the Dentists Act 1931 which was the parent legislation, provided for inclusion in the registration of a qualified dentist new or additional qualifications acquired by a qualified dentist. The dental board however made regulations that restricted the inclusion of additional qualifications only to those qualifications relevant to a person first seeking registration as a dentist. Richards J there held that the regulations were ultra vires the parent law. F

[123] A useful example referred to in the course of the hearing is *V Sudeer v Bar Council of India* AIR 1999 SC 1167. The brief facts are as follows. The Advocates Act 1961, being the principal Act, did not stipulate that an applicant for admission to the Bar was required to sit for a pre-enrolment training course and examination. However, this requirement was imposed as an additional qualification by rules made by the Bar Council under an enabling provision. The Supreme Court held that the said additional qualification was ultra vires the parent Act as it had the effect of 'whittling-down' the qualifications listed in the parent legislation and disqualifying an otherwise eligible candidate. G H

[124] In *Palmco Holdings Bhd v Commissioner of Labour & Anor* [1986] 1 MLJ 492 at p 494 Hashim Yeop A Sani SCJ explained: I

> The term ultra vires in relation to a delegated legislation can be interpreted in a double sense. First it can mean that the rule or regulation in question deals with a subject not within the scope of the power conferred upon the delegated legislative

authority. Second, it can also mean that although the delegated legislation in question deals with the proper subject it has gone beyond the limits prescribed by the parent law.

[125] The second 'sense' applies in the current appeal wherein r 10 is clearly ultra vires its parent law as it has gone past the limit prescribed by the Act. Admitting only Muslims as *peguam syarie* has no nexus to the object of the Act. This additional requirement which militates against the very intention of Parliament is contextually unsustainable, and has imposed a restrictive and draconian qualification, something not subscribed in the Act.

THE CONSTITUTIONAL POINT

[126] Article 4(1) provides that the constitution is the supreme law of the Federation and any law passed after Merdeka Day, which is inconsistent with the constitution shall, to the extent of the inconsistency, be void. A federal law derives its existence from the constitution and there is no qualification attached to it. Any law passed must be subordinate to the constitution, and in the context before us, any law must be read subject to the liberty clauses, provided under Part II of the Federal Constitution (fundamental liberties part). In *Aminah v Superintendant of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92 it was held that a person arrested under any law was entitled to the protection of art 5 (a liberty clause), thus endorsing that any law passed must be subordinate to the constitution. By that same token a state enactment, it being law, thus must be read subject to the Federal Constitution, and as aforementioned, it being the supreme law of Malaysia.

[127] Under art 8(1) all persons are equal before the law and entitled to the equal protection of the law.

[128] Article 8(2) legislates that unless expressly authorised by the constitution, ' ... there shall be no discrimination against citizens on the ground only of religion ... '

[129] With courts recognising the improbability of absolute equality, principles have been laid down by judicial doctrines of reasonable classification when interpreting art 8. Under the doctrine of reasonable classification people in like circumstances will be treated alike, with discrimination in certain instances existing between classes though not within a particular class. The necessity of legislative discrimination is due to the 'complex problems arising out of an infinite variety of human relations' (see *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128). Without the need to dwell too deeply on case laws, suffice if I state that it is now well established that a law that discriminates may be validated if it is based on reasonable classification (*Danaharta Urus Sdn Bhd*

v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72). This point was ventilated by both parties as briefly mentioned at paras 23, 24, 36, 37 and 38.

[130] Let us have another look at the facts before us. We have before us the Act and another piece of law (r 10) supposed to be facilitative in nature. There is no problem with the Act in the current form as it is non-discriminative. The dissatisfaction is with r 10. Rule 10 must be struck down if it discriminates without reasonable classification.

[131] Any fear that a *peguam syarie*, regardless of his religion may interfere with the personal law of his Muslim client in the course of a Syariah proceedings, is without basis. By no stretch of the imagination will the respondent be involved in the eventual decision here. That responsibility falls squarely on the lap of the presiding Syariah judge, who not only enforces the personal law of the Muslim litigant, but is the decider of facts and law in the relevant proceedings.

[132] On the issue of legal professionalism, I fail to fathom how a non-Muslim *peguam syarie* may detract from or be inconsistent with the enforcement of justice and purport of the administration of Islamic Law or the organisation of Syariah Court, more so as there is no evidence before us that may support such an unfounded eventuality.

[133] However, art 8 cl (5) of the Federal Constitution contains specific constitutional exceptions to the rule against discrimination contained in the earlier clauses of art 8. Clause (5) recognises the difference between factual equality which is not empirically borne out in real life and a legal status that is recognised by law (*Constitutional Law in Malaysia & Singapore* (3rd Ed) by Kevin YL Tan & Thio Li-ann).

[134] Article 8(5)(a) does not invalidate or prohibit any provision that regulates personal law, which generally means domestic relations, family matters, succession, marriage, divorce and the like. This is not the issue before us.

[135] Clause (5) para (b), however, is the provision which is relevant to the issue before this court. It provides that the following is not invalidated or prohibited by art 8:

> (b) any provision or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion.

[136] What the respondent sought by seeking admission is the position of *peguam syarie*. The respondent's ultimate objective for such admission must be to enable her to carry on that profession by which she is able to take up appointment by clients to represent them in the Syariah Court.

[137] The term 'office' is not defined in the Federal Constitution. Hence it must be accorded its normal ordinary meaning. The *Oxford Dictionary* gives the meaning, among others, of 'a position or place to which certain duties are attached, esp one of a more or less public character'. A *peguam syarie* who accepts the appointment by a client to represent him in the Syariah Court certainly has to perform duties connected to that appointment. As an 'officer of the court' a *peguam syarie* also had duties vis a vis the Syariah Court where he practices.

[138] Similarly, the term 'employment' is not defined in the Federal Constitution. The *Concise Oxford Dictionary* defines the verb to 'employ' as, inter alia, to 'use the services of (a person) in return for payment'. The term 'employment' is defined as '(1) The act of employing or the state of being employed. (2) A person's regular trade or profession'.

[139] There can be no doubt that when the respondent sought to be admitted as a *peguam syarie* she was seeking to be admitted to an 'office' that would enable her to then accept 'employment' by clients to represent them in the Syariah Court and carry on her profession in the Syariah Courts. Given the jurisdiction of the Syariah Courts, that office and that employment are certainly connected to the affairs of the religion of Islam. Consequently, a provision restricting admission as *peguam syarie* to Muslims is within the constitutional exception in art 8(5)(b).

[140] I now discuss art 5. Under this article no person shall be deprived of his life or personal liberty save in accordance with law.

[141] The Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 adopted a broad approach to the definition of 'life' legislated in art 5(1). For brevity, I find no necessity in reproducing the reasoning behind that broad approach. Suffice if I regurgitate what the court said through Gopal Sri Ram JCA:

> ... the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment ...

[142] The effect of the above approach (though in relation to the definition

of 'life' and which regretfully failed to discuss the earlier case of *Government of Malaysia & Ors v Loh Wai Kong*) is that under art 5 the respondent is guaranteed of her fundamental right to livelihood; she is not to be deprived of her livelihood by a negative or restrictive provision. Needless to say r 10 in its current format, which negatives and restricts her rights, and acquiescing to Gopal Sri Ram's JCA point of view, would invariably infringe the respondent's constitutional rights.

[143] Lord Suffian LP, on the other hand, in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33, when discussing the issue at hand, stated that art 5 speaks of personal liberty and not of liberty simpliciter. This article only relates to the person or body of the individual. Personal liberty was held not to include certain rights, like right of travel or right to passport. The respondent there had argued that the refusal or delay in granting him a passport violated his right of personal liberty under art 5.

[144] In the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, this court had occasion to state:

> In our view, the words 'personal liberty' should be given the meaning in the context of art 5 as a whole. In this respect, we adopt what has been said by Suffian LP in Loh Wai Kong ...

[145] Mohamed Dzaiddin FCJ in the above case also endorsed the following words of Suffian LP, which read:

> ... In the light of this principle, in construing 'personal liberty' in art 5 one must look at the other clauses of the article, and in doing so we are convinced that the article only guarantees a person, ... from being 'unlawfully detained ... It will be observed that these are all rights relating to the person or body of the individual ...

[146] In *Lo Pui Sang and Others v Mamata Kapildev Dave and Others (Horizon Partners Pte Ltd, Intervener) and Other Appeals* [2008] 4 SLR 754, when discussing art 9(1) of the Singapore Constitution (in pari materia with art 8(1) of the Federal Constitution), Choo Han Teck J said:

> I do not think that the phrase 'personal liberty' in Article 9 was a reference to a right of personal liberty to contract. It has always been understood to refer only to the personal liberty of a person against unlawful incarceration or detention (emphasis supplied).

[147] It cannot be overly emphasised that the Federal Constitution has meticulously delineated matters of fundamental liberties, as set out in Part II of the Federal Constitution, consisting of arts 5 to 13. They are provisions that:

(a) ensure the liberty of the person (art 5);

(b) prohibit slavery and forced labour (art 6);

(c) provide protection against retrospective criminal laws and repeated trials (art 7);

(d) legislate equality before the law and the rights to equal protection of the law (art 8) regardless of citizenship;

(e) lay down the prohibition of banishment and freedom of movement (art 9);

(f) promulgate freedom of speech, assembly and association (art 10);

(g) ensure freedom of religion (art 11);

(h) confirm the rights in respect of education (art 12); and

(i) provisions that guarantee protection to property (art 13).

[148] Despite such guarantees, the Federal Constitution on the other hand provides that Parliament, pursuant to Part XI under art 149, may in certain circumstances pass laws that may be inconsistent with arts 5, 9 or 10. Under art 150 the Yang di Pertuan Agong under certain circumstances may proclaim an emergency and Parliament may pass laws that may be inconsistent with the provisions of the constitution including provisions for fundamental liberties (*The Constitution of Malaysia* by M Suffian). In short, despite the liberties being fundamental and guaranteed by the constitution 'they are not immutable or beyond the periphery of the amendatory powers of Parliament' (*Federal Constitution of Malaysia-a commentary* by KV Padmanabha Rau).

[149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. I therefore am inclined to adopt the approach of Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* that art 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right of travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art 9. On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a *peguam syarie* falls outside the ambit of art 5. Article 5 thus is of no help to the respondent.

[150] I now briefly discuss the respondent's art 10(1)(c) argument. She ventilated that pursuant to r 10 her right was infringed under this article. Under this article all citizens have the right to form associations. Historically this article is associated with free speech right, whereupon like-minded people will band together in order to collectively project their views and cause. To enhance their cause these people will set up associations in the like of trade

unions, political bodies and student bodies (*Constitutional Law in Malaysia & Singapore* p 1148). Regardless of that right, under para (c) of cl 1, restrictions may be imposed if it relates to education and labour matters.

[151] Apart from being a guardian of the constitutional rights of the citizen, it is also the duty of courts to interpret constitutional provisions. Let us look at the respondent's complaint vis a vis cl 1 para (c). This provision speaks of 'right to form associations'. The question that begs to be answered is whether this article is relevant to her argument, in light of the fact that her complaint relates to the denial of her being a member of a profession, and not of being denied the right to form an association. In light of the clear purpose of art 10(1)(c), which has nothing to do with admission as a *peguam syarie*, I therefore hold that the respondent's argument premised on this article must fail.

CONCLUSION

[152] For all the above reasons discussed I hold that the promulgation of r 10, enabled by s 59(2), cannot go beyond the qualification of ' ... sufficiency of knowledge in Islamic Law'. The appellant cannot by way of a subsidiary legislation, make r 10 that is inconsistent with s 59(1). It is thus ultra vires the parent Act.

[153] Rule 10 therefore can be declared null and void pursuant to s 23 of the Interpretation Acts 1948 and 1967.

[154] My learned sister Zaharah Ibrahim FCJ has read this judgment in draft and has expressed her agreement with it.

[155] For the above reasons, I dismiss the appellants' appeal with costs.

[156] Question 1 is answered in the affirmative.

[157] Question 2 is answered in the negative.

Appeals allowed with no order as to costs.

Reported by Kohila Nesan